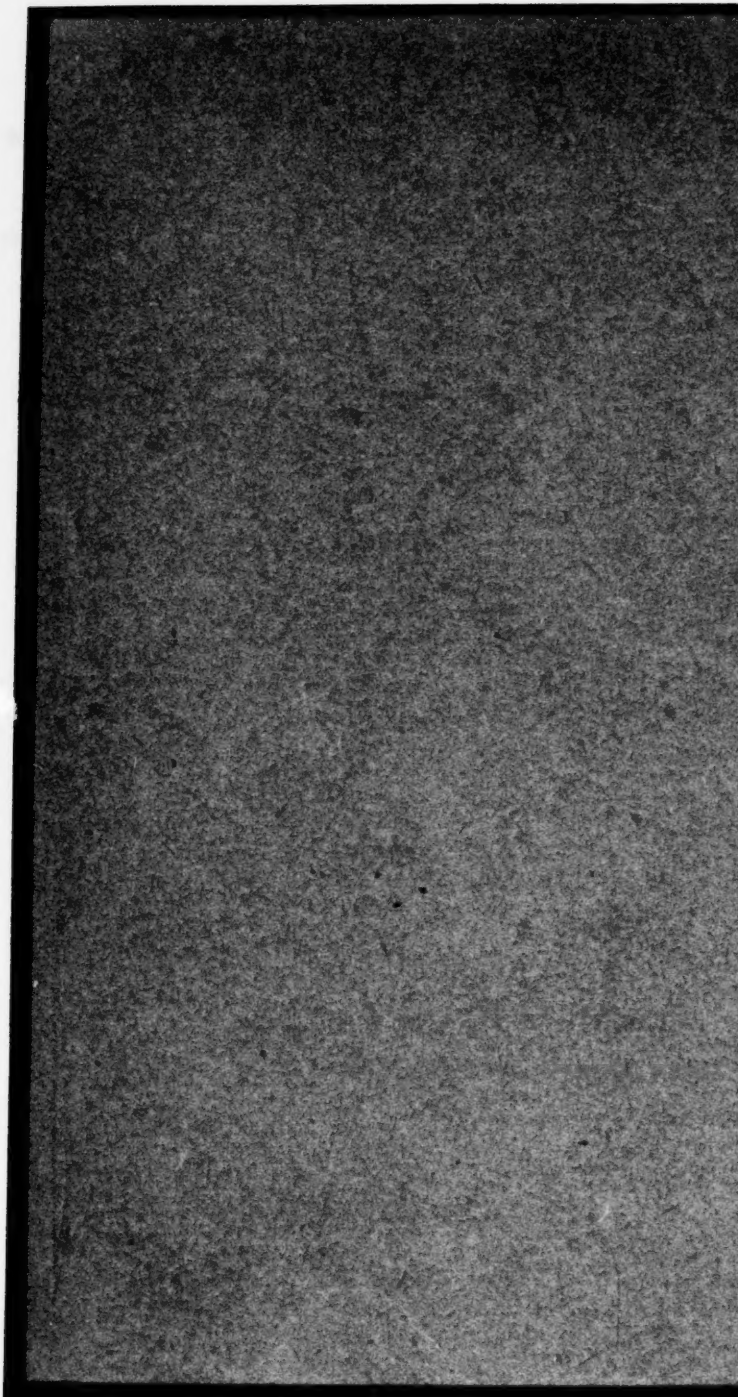
(16,257)



(16,257)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1896.

No. 491.

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HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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a Fourth Judicial Circuit.

In the Circuit Court of the United States for the District of West Virginia, at Parkersburg.

HENRY C. KING
*vs.*
SIMON S. ALTIZER *et al.* } In Ejectment.

Tried as to defendants M. B. Mullins, Alexander McClintock, John McClintock.

1 Be it remembered that heretofore, to wit, at rules held in the clerk's office of the circuit court of the United States for the district of West Virginia, at Charleston, on the 4th day of March, 1895, came Henry C. King, by counsel, and filed his declaration in ejectment; which said declaration in ejectment is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia, Fourth Judicial Circuit.

Henry C. King, a citizen and resident of the State of New York, plaintiff, complains of Simon S. Altizer, Aaron Altizer, J. Altizer, Joseph Altizer, J. C. Alderson, W. W. Adams, H. C. Avis, John R. Browning, Chapman Browning, Joseph Browning, Aaron Browning, Levi Browning, Russell Browning, Albert Browning, Loran Browning, Jesse L. Browning, Milton Browning, William C. (commonly called Chapman) Browning, Cloyd Bailey, King Hiram Blankenship, Henry Blankenship, Richard B. Blankenship, J. H. Blankenship, J. M. Blankenship, U. B. Buskirk, Curtis Ballard, Eli Blankenship, Joseph H. Blankenship, Larkin Cline, G. W. Cline, William Cline, Moses C. Cline, Anthony Cline, Abe Cline, Harrison Cline, L. D. Chambers, Margaret L. Chambers, Martha J. Chambers, James L. Chambers, Sidney Chambers, William Claypool, P. B. Dobbins, trustee; John Davis, Sherman Davis, Charles Elkins, Uriah W. Elkins, Crockett Allison, Leander Ellis, Scott Ellis, J. B. Ellison, A. J. Ellis, O. F. Ferrell, L. B. Godfrey, Joel Gibson, Anderson Grimmett, J. N. Gibson, Joseph Hinchman, L. D. Hinchman, George Hinchman, Sarah D. Hatfielf, Alexander Hatfield, F. M. Harless, Ward Hatfield, W. E. Justice, C. E. Justice, W. A. Johnson, R. L. Joyce, W. T. Kenneda, John Kenneda, F. M. Kenneda, S. P. Kelly, Lewis J. Lester, Pleasant Lester, Bruce McDonald, Wayne McDonald, William W. McDonald, Millard McDonald, G. R. McDonald, Alexander McClintock, John
2 McClintock, George Mounts, Elijah Mounts, M. B. Mullins, Joseph Murphy, M. J. Morgan, James A. Nighbert, Oliver Perry, Jasper Perry, J. F. Paul, J. A. Peck, William Riffe, William Riffe, Jr., Nancy C. Rutherford, Lewis Riffe, Leander Riffe, L. D. Riffe, E. H. Simpkins, Joseph Simpkins, J. S. Stafford, Ralph Steel, Harrison Steel, J. A. Sheppard, Samuel Stafford, W. G. Sansom,

Martha Steel, A. M. Toler, J. C. B. Toler, A. H. Toler, J. M. P. Toler, J. C. Toler, Mary B. Toler, Lara Z. Toler, Nettie Toler, J. E. Toler, Alexander Trent, F. Marion Trent, A. A. Vance, Charles Walker, Preston Walker, J. E. Chilton, trustee, citizens and residents of said State of West Virginia, and Grayton Mining Company, Grayton Water Works and Improvement Company, Forest Coal Company, and Spruce Coal and Lumber Company, corporations organized under the laws of said State of West Virginia, and Bowman Lumber Company, a foreign corporation doing business in said State of West Virginia, defendants, of a plea of trespass, to wit, that heretofore, to wit, on the 1st day of January, A. D. 1894, the plaintiff was possessed in fee of a certain tract or parcel of land in the States of Virginia, West Virginia, and Kentucky, being a tract of land granted to Robert Morris by the Commonwealth of Virginia by patent dated June 23d, A. D. 1795, and in said patent described as follows:

Beginning at two poplars and two chestnut trees on a branch of Guyandotte river, about six miles from the mouth of Little War creek, a branch of Sandy river, being a corner of a survey of said Nicholas of 480.000 acres and of a survey of 320,000 acres made for said Nicholas and Jacob Kinney, and with a line of the latter S. 33 degrees W. 6,720 poles, crossing a dividing ridge, and down War creek to the mouth, crossing Sandy river at six miles, crossing Panther creek at nine miles, and crossing several ridges to four white oaks on the northwest bank of Knox creek, and thence, leaving said survey, W. 3,840 poles, crossing said creek and some of the branches thereof and along the spurs of the ridge dividing the waters of said creek and Peter's creek, a branch of Sandy river, to three poplars and a sugar tree by a small branch of Knox creek; thence N. 8,000 poles, crossing Knox creek at about four miles, Sandy river at twelve miles, at the mouth of Turkey creek, and up said creek and the N. W. forks of same, crossing Buffalo creek, Pigeon creek, and the dividing ridge between Sandy and Guyandotte rivers and Gilbert's creek twice, a branch of Guyandotte, to three sugar trees in a bottom of said river and about 20 poles below the mouth of Gilbert's creek, and thence N. 10 degrees E. 4,450 poles, crossing Guyandotte river, several small branches, and some ridges to pointers; thence E. 6,620 poles, crossing Guyandotte river and several branches thereof, to three sugar trees and a buckeye by a small branch of the same, being the N. W. corner of a survey of said Nicholas of 480,000 acres, and thence with same S. 6,800 poles, crossing Huff's or Cain creek, to the beginning.

3

And that, plaintiff being so possessed of said land as aforesaid, defendants afterwards, to wit, on the 1st day of April, A. D. 1894, entered upon that portion thereof lying in the said State of West Virginia and unlawfully withhold the possession of same from plaintiff, to the damage of plaintiff in the sum of fifty thousand dollars ($50,000.00), and plaintiff says that the value of the matter in dispute herein exceeds the sum of five thousand dollars ($5,000.00), exclusive of costs.

Wherefore plaintiff brings this suit.

In the Circuit Court of the United States for the District of West Virginia, Fourth Judicial Circuit.

To Simon S. Altizer, Aaron Altizer, J. Altizer, Joseph Altizer,
4 J. C. Alderson, W. W. Adams, H. C. Avis, John R. Browning, Chapman Browning, Joseph Browning, Aaron Browning, Levi Browning, Russell Browning, Albert Browning, Loran Browning, Jesse L. Browning, Milton Browning, William C. (commonly called Chapman) Browning, Cloyd Bailey, King Hiram Blankenship, Henry Blankenship, Richard B. Blankenship, J. H. Blankenship, J. M. Blankenship, U. B. Buskirk, Curtis Ballard, Eli Blankenship, Joseph H. Blankenship, Larkin Cline, G. W. Cline, William Cline, Moses C. Cline, Anthony Cline, Abe Cline, Harrison Cline, L. D. Chambers, Margaret L. Chambers, Martha J. Chambers, James L. Chambers, Sidney Chambers, William Claypool, P. B. Dobbins, trustee; John Davis, Sherman Davis, Charles Elkins, Uriah W. Elkins, Crockett Allison, Leander Ellis, Scott Ellis, J. B. Ellison, A. J. Ellis, O. F. Ferrell, L. B. Godfrey, Joel Gibson, Anderson Grimmett, J. N. Gibson, Joseph Hinchman, L. D. Hinchman, George Hinchman, Sarah D. Hatfield, Alexander Hatfield, F. M. Harless, Ward Hatfield, W. E. Justice, C. E. Justice, W. A. Johnson, R. L. Joyce, W. T. Kenneda, John Kenneda, F. M. Kenneda, S. P. Kelly, Lewis J. Lester, Pleasant Lester, Bruce McDonald, Wayne McDonald, William W. McDonald, Millard McDonald, G. R. McDonald, Alexander McClintock, John McClintock, George Mounts, Elijah Mounts, M. B. Mullins, Joseph Murphy, M. J. Morgan, James A. Nighbert, Oliver Perry, Jasper Perry, J. F. Paul, J. A. Peck, E. H. Simpkins, Joseph Simpkins, J. S. Stafford, Ralph Steel, Harrison Steel, J. A. Sheppard, Samuel Stafford, W. G. Sansom, Martha Steel, A. M. Toler, J. C. B. Toler, A. H. Toler, J. M. P. Toler, J. C. Toler, Mary B. Toler, Lara Z. Toler, Nettie Toler, J. E. Toler, Alexander Trent, F. Marion Trent, A. A. Vance, Charles Walker, Preston Walker, J. E. Chilton, trustee, citizens and residents of said State of West Virginia, and Grayton Mining Company, Grayton Water Works and Improvement Company, Forest Coal Company, and Spruce Coal and Lumber Company, corporations organized under the laws of said State of West Virginia, and Bowman Lumber
5 Company, a foreign corporation doing business in said State of West Virginia, defendants:

You are hereby notified that the foregoing declaration in ejectment will be filed in the office of the clerk of said circuit court, at Charleston, West Virginia, on the first Monday of March, A. D. 1895, and if you fail to appear and plead thereto judgment will be given against you.

HENRY C. KING,
By MAYNARD F. STILES,
*His Attorney.*

STATE OF WEST VIRGINIA, } *ss:*
*County of McDowell,* }

John Rose, a credible person of lawful age, being duly sworn, doth say that he served the foregoing notice and declaration in said State upon Jesse L. Browning Jan. 26th, 1895, and upon M. J. Morgan, John Davis, Sherman Davis, Preston Walker, Samuel Stafford, and F. M. Harless February 1st, 1895, and on Cloyd Bailey February 9th, 1895, all being defendants named therein, by delivering to each of said defendants a copy of said notice and declaration.

JOHN ROSE.

Subscribed and sworn to before me this 9th day of February, 1895.

J. R. AUVILLE, *J. P.*

STATE OF WEST VIRGINIA, } *To wit:*
*Logan County,* }

C. S. Stone, a credible person, being duly sworn, on oath states that he executed the within notice upon M. B. Mullins, Simon S. Altizer, Wayne McDonald, Ralph Steel, Sarah D. Hatfield, Joseph Simpkins, Nancy C. Rutherford, A. M. Toler, U. B. Buskirk,
6 King Hiram Blankenship, S. P. Kelly, F. M. Kenneda, J. A. Sheppard, James A. Nighbert, J. B. Ellison, C. E. Justice, in Logan county, West Virginia, by delivering to each of them a copy of the within writ and notice on the 3d day of January, 1895, and also upon the Grayton Works and Improvement Company and Grayton Mining Company, corporations organized under the laws of West Virginia, by delivering to H. K. Shumate, their authorized agent of record, upon whom process can be served, in Logan county, West Virginia, on the 5th day of January, 1895, a true copy of said writ and notice.

C. S. STONE.

Taken, subscribed, and sworn to before the undersigned authority in and for said county & State aforesaid by C. S. Stone, a credible person, on this 5th day of January, 1895.

Given under my hand and official seal this 5th day of January, 1895.

J. B. WILKINSON,
*Notary Public.*

[NOTARIAL SEAL.]

STATE OF WEST VIRGINIA, } *ss:*
*County of McDowell,* }

Anthony J. Manns, a credible person, of lawful age, being by me duly sworn, doth say that he served the annexed notice and declaration upon the following-named persons, defendants therein named, in said State of West Virginia, upon the days and in the manner following, to wit: Upon Leander Ellis, Scott Ellis, Bruce McDonald, and Alexander Trent January 7th, 1895; upon Uriah W. Elkins Jan. 8th, 1895; upon J. C. Toler and J. M. P. Toler Jan. 9th,

1895; upon Henry Blankenship, Eli Blankenship, Joseph H. Blankenship, A. J. Ellis, Pleasant Lester, William Riffe, Lewis Riffe, and Leander Riffe Jan. 28th, 1895; upon Moses C. Cline, Anthony Cline, and Harrison Cline Jan. 30th, 1895; upon Russell Browning, Albert Browning, and Charles Elkins Jan. 31st, 1895; upon
7 Joseph Browning, Levi Browning, Wc. C. (alias Chapman) Browning, Anderson Grimmett, L. D. Hinchman, and William Claypool February 1st, 1895; upon Aaron Altizer, Joseph Altizer, G. R. McDonald, Margaret L. Chambers, James L. Chambers, Joseph Hinchman, and Oliver Perry February 2nd, 1895; upon R. L. Joyce February 4th, 1895, and upon Joseph Perry February 5th, 1895, by delivering to each of said defendants a true copy of said notice and declaration, and upon O. F. Ferrell, W. A. Johnson, George Mounts, and F. Marion Trent Jan. 7th, 1895; J. H. Blankenship and Larkin Cline Jan. 8th, 1895; L. B. Godfrey, Ward Hatfield, Lewis J. Lester, and William Riffe, Jr., Jan. 28th, 1895; Loran Browning, Aaron Browning, Milton Browning, and Millard McDonald February 1st, 1895; H. C. Avis and L. D. Chambers February 2nd, 1895, and A. A. Vance February 4th, 1895, by leaving at the usual place of abode of each of said defendants, with the wife of each of said defendants respectively, a true copy of said notice and declaration and informing the said wife of each of said defendants respectively of the purport of said copy, the said defendants not being found by affiant; and upon William W. McDonald January 8th, 1895, by delivering to Bruce McDonald, son of said Wm. W. McDonald, over the age of sixteen years, at the usual abode of said Wm. W. McDonald, who was not found by affiant, a true copy of said notice and declaration and giving to him information of the purport of said copy; upon George Hinchman, who affiant did not find, by delivering to and leaving with a son of said defendant over the age of sixteen years, at his usual place of abode, a copy of said notice and declaration, February 2nd, 1895, and giving said son information of the purport of said copy; and upon Martha J. Chambers, who affiant did not find, by delivering to her husband, who is over the age of sixteen years, at her usual place of abode, a copy of said notice and declaration and giving to him information of the purport of said copy.

8 ANTHONY J. MANNS.

Subscribed and sworn to before me this 9th day of February, 1895.

J. R. AUVILLE, *J. P.*

Served on Sidney Chambers by delivering him a true copy of the within ejectment Feb. 4th, 1895. Served on J. M. Blankenship by delivering him a true copy of the within ejectment Feb. 7th, 1895. Served on John R. Browning by delivering to his son, Lafe Browning, a true copy of the within ejectment Feb. 11th, 1895.

G. W. HATFIELD,
*Dept. U. S. M.*

STATE OF WEST VIRGINIA, }
*County of Cabell.* }

9 R. N. Owens, being duly sworn, doth say that he served the annexed notice and declaration upon defendant J. A. Peck in said county February 21st, 1895, by delivering to him in person a true copy of said notice and declaration.

R. M. OWENS,
*Marshal, Town of G.*

Subscribed and sworn to before me this 21st day of February, 1895.

SAM. D. HAYSLIP,
[NOTARIAL SEAL.] *Notary Public.*

STATE OF WEST VIRGINIA, } *To wit:*
*Kanawha County,* }

W. C. Fagg, a credible person, being duly sworn, on oath states that he executed the foregoing writ & notice thereto attached upon the Bowman Lumber Company, a foreign corporation, by delivering a copy of the same to E. B. Knight on the 20th day of February, 1895, and on G. S. Couch on the 22 day of February, 1895, composing the firm of Knight & Couch, in said county of Kanawha, being said company's authorized agent of record upon whom process is to be served, and executed upon J. E. Chilton, trustee, in said county of Kanawha, by delivering to him a copy of same on the 21st day of February, 1895.

W. C. FAGG.

Taken, subscribed, & sworn to before me, in said county, on this 22nd day of February, 1895.

J. N. CARR,
*Notary Public in and for Kanawha County, West Virginia.*

STATE OF WEST VIRGINIA, } *To wit:*
*McDowell County,* }

10 V. A. Wilder, a credible person, being duly sworn, on oath says that he executed the within declaration and notice attached upon P. B. Dobbins, trustee; J. F. Paull, Forest Coal Company, Spruce Coal & Lumber Company (the last two corporations formed under the laws of West Virginia), in the county of Ohio, State of West Virginia, on the 22nd day of February, 1895, by delivering to said P. B. Dobbins, trustee, and J. F. Paul a copy of same; on Spruce Coal & Lumber Company by delivering a copy thereof to P. B. Dobbins, its authorized agent of record upon whom process can be served, & upon Forest Coal Company by delivering to J. F. Paul, its authorized agent of record upon whom process can be served, and also served said declaration & notice upon J. C. Alderson by delivering a copy thereof to H. M. Taylor, his clerk,

at his place of business, in Ohio county, West Virginia, on the 22nd day of February, 1895, said Alderson being not found there.

V. A. WILDER.

Taken, subscribed, & sworn to before me this 23 day of February, 1895.

J. R. GREENAWALT,
*Notary Public.*

STATE OF WEST VIRGINIA, }
*County of McDowell,* } *ss:*

Anthony J. Manns, a credible person, of lawful age, being duly sworn, doth say that he served the foregoing notice and declaration in said State upon Lara Z. Toler, now Lara Z. Livingston; G. W. Cline, Nettie Toler, Mary B. Toler February 25, 1895; upon W. T. Kenneda, Martha Steel, W. G. Sansom February 26th, 1895, all being defendants named therein, by delivering to each of said defendants a copy of said notice & declaration, and upon Crockett Allison, J. C. B. Toler February 25, 1895; John Kenneda, Harrison Steele, Joseph Murphy, Elijah Vance February 26th, 1895,
11 all being defendants named therein, who were not found by affiant, by delivering to the wife of each of them, at their usual place of abode, a true copy of said notice and declaration, and giving to each of them information of the purpose of such copy.

ANTHONY J. MANNS.

Subscribed & sworn to before me this 27 day of February, 1895.
J. R. AUVILLE, *J. P.*

(Endorsed.)

We, the jury, by direction of the court, find the defendants M. B. Mullins, Alexander McClintock, and John McClintock not guilty.
A. J. SMITH, *Foreman.*

And on the same day, to wit, March 4th, 1895, the following docket entries were made, to wit:

Plea, N. G., by S. P. Kelly, in person; appearance & plea of N. G. by J. E. Chilton, for def'ts McDonald; appearance of sundry def'ts by Ferguson—plea, N. G.; non-residence suggested & rule for security for costs.

And at another day, to wit, on the 23d day of March, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
SIMON S. ALTIZER *et als.* } In Ejectment.

This day came the plaintiff, by his attorneys, and on his motion it is ordered that W. C. Reddy and W. D. Sell, surveyors and civil engineers, who are hereby designated and appointed for the purpose,

do go upon the land in controversy in this suit and upon such adjacent and neighboring land as it may be necessary or proper to survey for the purpose of this suit and there do such surveying as they may be requested to do by any party to said suit and return into this court two reports, together with nine fair plats or prints of said surveying, showing how they shall have executed said order.

That before proceeding to make said survey they shall give to the parties or their attorneys ten days' notice of the time when and the place where they will begin to do such surveying.

And at another day, to wit, on the 8th day of July, 1895, the following order was made and entered of record, to wit:

HENRY C. KING, Plaintiff,
*vs.*
SIMON S. ALTIZER *et als.*, Def'ts. } In Ejectment.

In this cause came this day the plaintiff, by his counsel, and defendants Sarah D. Hatfield, Nancy C. Rutherford, and William Claypool, by their counsel, severing from their codefendants herein, and presented to the court a stipulation between plaintiffs and said defendants for the trial of the controversies between said parties, and asked leave to file the same, and that the same be set down for hearing and trial.

Whereupon the court doth order that said stipulation be filed in said cause, and doth set down the same to be heard upon the question of forfeiture of plaintiff's title to the land claimed by him as presented by said stipulation before this court, at Parkersburg, on the 28th day of June current.

And it is further ordered that said cause heretofore and now pending at Charleston be, and the same is hereby, removed and transferred to this court, at Parkersburg, there to be further proceeded in.

13 And at another day, to wit, on the 16th day of October, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
S. S. ALTIZER *et al.* } In Ejectment.

This day came the plaintiff, by his attorneys, and the defendants M. B. Mullins, Alex. McClintock, and John McClintock, who elected to sever in their defense from the other defendants named in the declaration, by their attorneys, and thereupon the said defendants for plea say that they are not guilty of unlawfully withholding from the plaintiff the premises in the declaration mentioned, and of this they put themselves upon the country, and the plaintiff doth the like, and issue is thereon joined. Thereupon came a jury, to wit, James Tavenner, Henry Graff, Salathiel Stalnaker, Charles R. Lowe,

John A. Sanders, B. R. Blackford, Joseph Good, Anthony Toothman, G. W. Taggart, Alex. Laird, M. R. Lowther, and Charles Ebert, twelve good and lawful men selected, tried, and sworn, as the law directs, to well and truly try the issue joined in this cause and a true verdict render according to the law and the evidence, who, having heard a part of the evidence and there not being time to hear the whole thereof before the adjournment of the court, were adjourned until tomorrow morning at 10 o'clock.

And at another day, to wit, on the 14th day of November, 1895, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS and Others. } In Ejectment.

This day came again the parties, by their attorneys, and
14 the jury which was empannelled and sworn on a former day of this term to try the issue joined in this cause appeared pursuant to their adjournment, and again retired to their room to consider further of their verdict, and after a time returned into court, and, having declared that they were unable to agree upon what verdict they should render in this cause, they were, by consent of all parties, discharged from further consideration of this cause, and this cause is continued until the next term of this court.

And at another day, to wit, on the 14th day of January, 1896, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS and ALEX. McCLINTOCK. } In Ejectment.

This day came the parties, by their attorneys, and thereupon, on motion, —— Henry was appointed official stenographer to report the proceedings in this cause; thereupon the said Henry appeared and in open court took the oaths required by law; thereupon came a jury, to wit, W. L. Shepherd, John W. Morgan, L. C. Shingleton, J. W. Boehm, John M. Geary, A. L. Wells, D. B. Patten, E. J. Taylor, B. M. Smith, James A. Cookman, C. D. Dotson, and Ashby Smith, twelve good and lawful men selected, tried, and sworn, as the law directs, to well and truly try the issue joined in this cause and a true verdict render according to the law and the evidence, who, having heard a part of the evidence and there not being time to hear the whole thereof before the adjournment of the court, were adjourned until tomorrow morning at 9.30 o'clock.

And at another day, to wit, on the 15th day of January, 1896, the following order was made and entered of record, to wit:

15 HENRY C. KING
*vs.*
M. B. MULLINS & ALEX. MCCLINTOCK. } In Ejectment.

This day came again the parties, by their attorneys, and the jury which was empannelled and sworn on a former day of this term to try the issue joined in this cause appeared pursuant to their adjournment, and, having heard further of the evidence in this cause and there not being time to hear the whole thereof before the adjournment of the court, were adjourned until tomorrow morning at 9.30 o'clock.

And at another day, to wit, on the 16th day of January, 1896, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS & ALEX. MCCLINTOCK. } In Ejectment.

This day came again the parties, by their attorneys, and thereupon D. S. Phlegar was appointed additional stenographer in this cause, and was duly sworn as such. Thereupon the jury which was empannelled and sworn on a former day of this term to try the issue joined in this cause appeared pursuant to adjournment, and, having heard further of the evidence in this cause and there not being time to hear the whole thereof before the adjournment of the court, were adjourned until tomorrow morning at 9.30 o'clock.

And an order for the further hearing and continuance of the case was made from day to day until the 27th day of January, 1896, when the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS & ALEX. MCCLINTOCK. } In Ejectment.

16 This day came again the parties, by their attorneys, and the jury which was empannelled and sworn on a former day of this term to try the issue joined in this cause appeared pursuant to their adjournment, and, having heard further of the evidence in this cause and there not being time to hear the whole thereof before the adjournment of the court, were adjourned until tomorrow morning at 9.30 o'clock; and it appearing to the court that Thomas L. Broun, a witness summoned to testify on behalf of the plaintiff upon the trial of this cause, is unable by reason of ill health to attend and testify upon the trial of said cause, upon motion of counsel for plaintiff in open court, it is ordered that the deposition of said Thomas L. Broun, *de bene esse*, to be read and used on behalf of plaintiff upon the trial of this cause now in progress, be taken at Charleston, West Virginia, at the office or residence of said Thomas L. Broun, on the 28th day of January, 1896, between the hours of 9 o'clock a. m. and 2 o'clock p. m., be-

fore some officer authorized to take depositions under the laws of the State of West Virginia.

And an order for the further hearing and continuance of the case was made from day to day until the 30th day of January, 1896, when the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS, ALEX. MCCLINTOCK, *et al.* } In Ejectment.

This day came again the parties, by their counsel, and the jury which was empanneled and sworn on a former day of this term to try the issue joined in this cause, who, having heard the evidence, by direction of the court returned the following verdict, to wit:

17 We, the jury, by direction of the court, find the defendants M. B. Mullins, Alexander McClintock, and John McClintock not guilty.

A. J. SMITH, *Foreman.*

And at another day, to wit, on the 31st day of January, 1896, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS *et al.* } In Ejectment.

The time in which to prepare the bills of exceptions to the ruling of the court in instructing the jury to return a verdict for the defendants on the question of the forfeiture of the title of the land claimed by the plaintiff is hereby extended to the 26th day of February, 1896, at which time the same will be signed and sealed, and this cause stands continued until said day.

And at another day, to wit, on the 26th day of February, 1896, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
SIMON ALTIZER, M. B. MULLINS, *et al.* } In Ejectment.

It is hereby ordered that the time for preparing bills of exceptions to the ruling of the court in instructing the jury to find their verdict for defendants in this cause, upon the ground of the forfeiture of the title to the land claimed by plaintiff, be, and the same is hereby, extended until tomorrow, February 27th, 1896, to which time this cause is hereby continued.

And at another day, to wit, on the 27th day of February, 1896, the following order was made and entered of record, to wit:

18 HENRY C. KING
*vs.*
M. B. MULLINS, ALEX. MCCLINTOCK, *et al.* } In Ejectment.

This day came again the parties, by their counsel, and thereupon the defendants, by their counsel, moved the court to render judgment upon the verdict of the jury rendered on the 30th day of January, 1896.

It is therefore considered by the court that the plaintiff take nothing by his bill, but for his false clamour be in mercy, &c., and that the defendants go thereof without day and recover of the said plaintiff their costs by them about their defence in this behalf expended.

And on the same day, to wit, on the 27th day of February, 1896, came the plaintiff, by counsel, and tendered and filed his bills of exceptions; which said bills are in the words and figures following, to wit:

*Plaintiff's Bill of Exceptions No. 1.*

HENRY C. KING
*versus*
SIMON S. ALTIZER *et als.* } Ejectment.

Be it remembered that upon the trial of this cause the plaintiff, to maintain the issue upon his part, introduced in evidence a certified copy of a grant issued by the Commonwealth of Virginia to Robert Morris June 23rd, 1795, for 500,000 acres of land then lying in the counties of Wythe and Russell, in Virginia, a large part whereof now lies in West Virginia, in the counties of Mingo, Logan, Wyoming, and McDowell, and in no other counties in West Virginia; which copy of said grant is in the following words and figures, to wit:

19 "Robert Brooke, Esquire, governor of the Commonwealth of Virginia, to all — whom these presents shall come, Greeting:

Know ye that by virtue of eleven land office treasury warrants, Nos. 652, 653, 654, 655, 658, 659, 643, 645, 647, 648, *and* issued the 28th August, 1794, and No. 619, issued 18th September, 1794:

There is granted by the said Commonwealth unto Robert Morris, assignee of Wilson Cary Nicholas, a certain tract or parcel of land containing 500,000 acres, by survey bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Guyandotte rivers and the waters thereof, and is bounded as follows, to wit:

Beginning at two poplars and two chestnut trees on a branch of Guyandotte river and about six miles from the mouth of Little War creek, a branch of Sandy river, being a corner of a survey of said Nicholas of 480,000 acres and a survey of 320,000 acres made for said Nicholas and Jacob Kenney, and with a line of the latter

S. 33° W. 6,720 poles, crossing a dividing ridge, and down War creek to the mouth, crossing Sandy river at 6 miles, crossing Panther creek at nine miles, and crossing several ridges to four white oaks on the northwest bank of Knox creek, and thence, leaving said survey, W. 3,840 poles, crossing said creek and some of the branches thereof and along the spurs of the ridge dividing the waters of said creek and Peter's creek, a branch of Sandy river, to three poplars and a sugar tree by a small branch of Knox creek; thence N. 8,000 poles, crossing Knox creek at about four miles, Sandy river at twelve miles, the mouth of Turkey creek, and up said creek and the northwest forks of the same, crossing Buffalo creek, Pigeon creek, and the dividing ridge between Sandy and Guyandotte rivers and
20 Gilbert's creek twice, a branch of Guyandotte, to three sugar trees in a bottom of said river and about 20 poles below the mouth of Gilbert's creek; thence N. 10° E. 4,450 poles, crossing Guyandotte river, several small branches, and some ridges to pointers; thence E. 6,620 poles, crossing Guyandotte river and several branches thereof, to three sugar trees and a buckeye by a small branch of the same, being the northwest corner of a survey of said Nicholas of 480,000 acres; thence with the same S. 6,800 poles, crossing Huff's or Cain creek, to the beginning.

But it is always to be understood that the survey upon which this grant is founded includes 4,000 acres, which, having a preference by law to the warrants and rights upon which Robert Morris' survey is founded, liberty is reserved that the said 4,000 acres shall be firm and valid, and shall have the same effect and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title as before mentioned and reserved, with its appurtenances:

To have and to hold the said tract or parcel of land, with its appurtenances, to the said Robert Morris and his heirs forever.

In witness whereof the said Robert Brooke, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the 23rd day of June, in the year of our Lord one thousand seven hundred and ninety-five, and of the Commonwealth the 19th. Book 31, page 613.

[SEAL.] ROBERT BROOKE.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 9th day of November, 1894.

W. R. GAINES,
[SEAL.] *Register of Land Office.*"

21 That plaintiff further offered evidence tending to prove that by sundry mesne conveyances and legislative and judicial proceedings the title of said Robert Morris to said tract of land in the year A. D. 1866 became vested in Robert E. Randall,

trustee, on June 29th, 1886, in John R. Reed, trustee, and through sundry mesne conveyances of the said Reed, trustee, David W. Armstrong, and Jno. V. Le Moyne passed to plaintiff, Henry C. King, December 27th, 1893, and that defendants were in possession of and claiming title to parts of said land within the bounds of said tract and outside the reservation in said grant when this action was brought and at the time of trial thereof.

That the defendants, to maintain the issue on their part, offered in evidence, to show an outstanding title in the State of West Virginia to said land, by forfeiture, a certificate of the auditor of said State of West Virginia in the following words and figures, to wit:

"STATE OF WEST VIRGINIA, }
"*Auditor's Office, Charleston.* }

"I, Isaac V. Johnson, auditor of the State of West Virginia, do hereby certify that neither Robert E. Randall, trustee, nor John R. Reed, trustee, nor John V. Le Moyne, Henry C. King, John Joseph Marie Schmidt Thornfeldt, August Marie Noverre d'Sericourt, Louis Antoine Des Virges de Maupertures, A. D. Maupertures, Emile Dumas, Charles Dumas, nor David W. Armstrong have entered on the land books of Wyoming, McDowell, Logan, Boone, or Mingo counties a tract of five hundred thousand acres of land for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, nor have either of them had said tract of five hundred thousand acres entered upon the land books of either or any of said counties for either or any of said years, nor have
22 they or either of them paid any taxes upon said land for any of said years within any of said counties, as appears from the records in my said office.

"I do further certify that said tract of five hundred thousand acres is not entered on the books of the assessor of any of said counties for any of said years.

"I do further certify that no land was entered on the books of the assessor of any of said counties for either or any of said years in the name of either or any of said parties.

"And I do further certify that none of the persons hereinbefore mentioned was charged on the land books of any of said counties with State tax on the land aforesaid or any part of it for the years aforesaid or any of them.

"In witness whereof I have hereunto set my hand and official seal this 29 day of October, 1895.

"I. V. JOHNSON,
[SEAL.] "*Auditor, State of West Virginia.*"

And plaintiff waived any objection to said certificate on account of the time of filing the same and offering the same in evidence and any want of notice of such filing and the intention to offer the same; but to the introduction of said certificate in evidence plaintiff, by counsel, objected upon the ground that the same is not the best evidence nor any evidence of an outstanding title in said State

to said land claimed by plaintiff, or of any forfeiture thereof or of any fact material to the issue in said cause; which objection of plaintiff was overruled by the court and said certificate was admitted and read in evidence; to which ruling of the court the plaintiff, by counsel, then and there excepted, and said exception was saved to him, and he prays that the same may be signed
23 and sealed and made part of the record, which is accordingly done, and is plaintiff's first bill of exception.

NATHAN GOFF. [SEAL.]

*Plaintiff's Bill of Exceptions No. 2.*

HENRY C. KING
*v.*
SIMON S. ALTIZER *et al.* } Ejectment.

Be it remembered that on the trial of this cause and after the matters stated in plaintiff's first bill of exceptions the defendants, to further maintain the issue on their part, offered in evidence, to be taken in connection with the certificate of the auditor mentioned in plaintiff's first bill of exceptions, a certified copy from the record of the circuit court of Wyoming county, West Virginia, and the report of E. M. Senter, commissioner of school lands of said Wyoming county; which said order and report are in words and figures following, to wit:

"WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Friday, the 18th day of April, 1890, for the transaction of chancery business.

Present: Hon. R. C. McClaugherty, judge.

This day W. B. McClure, commissioner of school lands for this county, appeared in open court and tendered his resignation as such commissioner, which was accepted by the court; thereupon the court appointed E. M. Senter, commissioner of school lands for this county, to fill the said vacancy; thereupon said Senter appeared in open court, together with L. B. Cook, J. J. Christian, and J. D. Shumate, his sureties, and entered into and acknowledged a
24 bond in the penalty of $5,000.00, conditioned according to law; which said bond was approved by the court as sufficient and ordered to be filed, which was accordingly done, and the clerk of this court is directed to record said bond in the bond book of this court; thereupon the said E. M. Senter appeared in open court and took the several oaths prescribed by law.

STATE OF WEST VIRGINIA, } *To wit:*
*County of Wyoming,* }

I, E. M. Senter, deputy for J. O. Sanders, deceased, clerk of the circuit court of said county, do certify that the foregoing is a true copy of the order appointing E. M. Senter, commissioner of school

lands for Wyoming county, West Virginia, as appears upon the records of my office.

Given under my hand and the seal of the said court this the 28th day of October, 1895.

E. M. SENTER,

[COURT SEAL.] *Deputy for J. O. Sanders, Clerk, Deceased.*"

" WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Saturday, the 31st day of March, 1894, for tge transaction of chancery business.

Present: The Honorable R. C. McClaugherty, judge.

This day E. M. Senter, commissioner of school lands for this county, filed his annual report of all tracts and parcels of lands which are liable to be sold for the benefit of the school fund, as required by section 5 of chapter 105 of the Code of West Virginia, as amended by the acts of the legislature of 1893, chapter 24; which report is in the following words and figures, to wit:

'To the Hon. R. C. McClaugherty, judge of the circuit court of Wyoming county, West Virginia:

25 *The Annual Report for the Year* 1894 *of E. M. Senter, Commissioner of School Lands of Wyoming County.*

Said commissioner of school lands of said county, in accordance with section 5 of chapter 105 of the Code of West Virginia, as *as* amended by the acts of the legislature of 1893, would beg leave to submit to the circuit court of said county the following report of a list of all tracts and parcels of land lying, in whole or in part, in said county of Wyoming, reported to him by the auditor of the State, as required by section 2 of chapter 105 of said Code, to wit, it being a list of lands within the county of Wyoming heretofore purchased for the State at sales thereof for delinquent taxes and not redeemed within one year or within the time required by law, made up from the records in the auditor's office and certified by the auditor to the clerk of the circuit court to be sold by the commissioner of school lands: 1. One tract of 366 acres on Clear fork, in Oceana district, charged to Sarah Ellis, and on the 14th day of December, 1891, sold for the taxes of 1889 and 1890. 2. One tract of 2,500 acres, in Oceana district, charged to Jesse R. Irwin, and on the 14th day of December, 1891, sold for the taxes of 1889. 3. One tract of 1,000 acres on Big fork, in Baileysville district, charged to Samuel Baugh, and on the 14th day of December, 1891, sold for the taxes of 1889. 4. One tract of 2,500 acres on Big fork, in Baileysville district, charged to Jesse R. Irwin, and on the 14th day of December, 1891, sold for taxes of 1889. 5. One tract of 2,500 acres on Guyandotte river, in Clear Fork dist., charged to Jesse R. Irwin *et al.*, and on the 14th day of December, 1891, sold for the taxes of 1889. 6. One tract of 2,500 acres on Huff's creek, in Huff's Creek district, charged to Jesse R. Irwin *et al.*, and on the 14th day of December, 1891, sold for the taxes of 1889. 7. One tract of

12 acres on Pinnacle creek, in Barker's Ridge district, charged
26 to Chas. L. Belcher, and on the 14th day of December, 1891, sold for the taxes of 1890. 8. One tract of 20 acres on Barker's ridge, in Barker's Ridge district, charged to Hugh J. Lilley's heirs, and on the 14th day of December, 1891, sold for the taxes of 1890. Said commissioner of school lands would further report that in the annual report of the commissioner of school lands for the year 1889 there was reported for sale for the benefit of the school fund 50,000 acres, forfeited in the name of the Pittsburgh National Bank of Commerce and sold on the — day of —— for the non-payment of the taxes due thereon for the years 1883 & 1884 and purchased by the State. There was also reported for like sale a tract of 5,000 acres, situated in Little Huff's Creek district, of said county, forfeited in the name of Smith & Fougeray and sold on the — day of —— for the non-payment of the taxes thereon for the years 1886 & 1887 and purchased by the State; also 4,000 acres, forfeited in the name of Smith & Fougeray, situated in Clear Fork district, of said county, and sold for the non-payment of taxes thereon for the years 1886 & 1887 and purchased by the State; also 3,000 acres in Baileysville district, of said county, and forfeited in the name of Smith & Fougeray and sold for the non-payment of taxes thereon for the years 1886 & 1887 and purchased by the State. The commissioner of the circuit court who was appointed to report upon proceedings heretofore instituted to sell the lands of said Pittsburgh National Bank of Commerce and Smith and Fougeray reported them a part of a 500,000-acre survey, Robert Morris patent, known as the "Robert E. Randall land," and that a suit was pending in the circuit or district court of the United States for the district of West Virginia, and that proceedings to sell the same under said formal proceedings had been enjoined. Said commissioner is advised that an error was made in said matter, and
that no suit was pending in said U. S. court with reference
27 to said 500,000-acre survey. The said commissioner of school lands would further report that it has come to his knowledge from Henry C. King, the present owner and claimant thereof, that a tract of 500,000 acres of land lying partly in this county and partly in the counties of Logan and McDowell, and the greater portion in the States of Virginia and Kentucky, was at the April term, 1883, of the circuit court of this county redeemed from a former forfeiture by Robert E. Randall, trustee, and all the taxes thereon paid prior to and including the year 1883; that since said redemption the said land has been omitted from the land books of this county for five consecutive years, to wit, for the years 1884, 1885, 1886, 1887, & 1888, and thereby the same has been forfeited to the State in the name of Robert E. Randall, trustee. The said commissioner of school lands further reports that each of said tracts hereinbefore mentioned are liable to be sold for the benefit of the school fund of this State on account of the forfeiture herein stated; all of which is respectfully submitted.

E. M. SENTER,
*Com'r of School Lands.*'

Which report is directed to be filed in the office of the clerk of this court, and the said commissioner of school lands is directed to institute in the name of the State of West Virginia suits in chancery for the sale of said lands, as required by section 6 of said chapter 105 of the Code of West Virginia, as amended by the acts of 1893, chapter 24.

STATE OF WEST VIRGINIA, } *To wit:*
*County of Wyoming,* }

I, E. M. Senter, deputy for J. O. Sanders, clerk of the circuit court of said county, deceased, do hereby certify that the foregoing is a true copy of the report of E. M. Senter, commissioner of
28 school lands for said county, filed at the March term of said court, 1894, together with a true copy of the order of the court filing the same.

Given under my hand and seal of the said court this the 28 day of October, 1895.

E. M. SENTER,

[COURT SEAL.] *Deputy for J. O. Sanders, Clerk, Deceased."*

To the introduction of which order and report and every part thereof in evidence plaintiff, by his counsel, objected upon the ground that the same are not the best evidence nor any evidence of forfeiture of the land claimed by plaintiff; that said report is not made in conformity with any law and is not authorized by law, but the court overruled said objection of plaintiff and permitted said order and report to be read in evidence to the jury; to which ruling of the court in admitting said order and report in evidence plaintiff, by counsel, then and there excepted and prayed that said exception be saved to him and signed, sealed, and made part of the record in this cause, which is accordingly done, and signed, sealed, and made part of said record, which is plaintiff's second exception.

NATHAN GOFF. [SEAL.]

*Plaintiff's Bill of Exceptions No. 3.*

HENRY C. KING }
*vs.* } Ejectment.
SIMON S. ALTIZER *et al.* }

Be it remembered that on the trial of this cause and after the matters stated in plaintiff's first and second bills of exceptions the defendants, to maintain the issue on their part, offered in evidence, to be taken in connection with the auditor's certificate men-
29 tioned in plaintiff's first bill of exceptions, a certified copy of an order of the circuit court of Logan county, West Virginia, and the report of U. B. Buskirk, commissioner of school lands of said county; which said order and report are in words and figures following, to wit:

"At a circuit court held for Logan county, at the court-house thereof, on April 1st, 1889, for the transaction of chancery business. Present: The Hon. Thomas H. Harvey, judge of said court.

The court this day appointed U. B. Buskirk as the commissioner of school lands for the county of Logan in the room and stead of L. D. Chambers, and the said U. B. Buskirk appeared in open court and accepted the trust, and together with R. W. Peck, J. B. Buskirk, J. R. Henderson, and Lewis Mullins, as his securities, entered into and acknowledged a bond in the penalty of $5,000.00, conditioned according to law, which is approved by the court and ordered recorded, and thereupon the said U. B. Buskirk took the several oaths required by law.

STATE OF WEST VIRGINIA, *Logan County,* } *To wit:*

I, T. C. Whited, clerk of the circuit court of said county, do hereby certify that the foregoing is a true copy of the order appointing U. B. Buskirk commissioner of school lands for Logan county, West Virginia, as appears from the records in my office.

Given under my hand and seal of said court this the 28th day of October, 1895.

[COURT SEAL.] T. C. WHITED, *Clerk.*"

The second of which is in the words and figures following, to wit:

*The Annual Report of U. B. Buskirk, Commissioner of School Land of Logan County, West Virginia, Filed in the Circuit Court of said County.*

30 To the Hon. Thomas H. Harvey, judge of said court:

In pursuance of section 5 of chapter 105 of the Code of West Virginia, the undersigned, U. B. Buskirk, commissioner as aforesaid, begs leave respectfully to report:

1. A list of all tracts and parcels of land lying wholly and in part in the county of Logan which have heretofore been reported for sale for the benefit of the school fund to the clerk of the circuit court of said county under sections 1 and 2 of said chapter 105.

2. A list of all tracts and parcels of land lying wholly and in part within the said county of Logan which in his opinion are liable to sale for the benefit of the school fund under the provisions of said chapter which have not been so reported for sale to the said clerk.

*List of said Land Reported to said Clerk.*

1. A tract of 1,000 acres in Hardee district, of said county, forfeited to the State of West Virginia in the name of John B. Goff.

2. A tract of 362 acres in said district forfeited to the State in the name of William Berry.

3. A tract of 80 acres in said district forfeited to the State in the name of Thomas L. Black.

4. A tract of 43 acres in said district forfeited to the State in the name of Thomas L. Black.

5. A tract of 49 acres in said district forfeited to the State in the name of Thomas L. Black.

6. A tract of 30 acres in said district forfeited to the State in the name of James Lowe's heirs.

7. A tract of 136 acres in said district forfeited to the State in the name of Pauley Little's heirs.

31 8. A tract of 500 acres in said district forfeited to the State in the name of John A. Lard.

9. A tract of 120 acres in said district forfeited to the State in the name of David Prince.

10. A tract of 1,000 acres in said district forfeited to the State in the name of Sarah V. Pugh.

11. A tract of 13 acres in said district forfeited to the State in the name of Nancye Pinson.

12. A tract of 345 acres in said district forfeited to the State in the name of John J. Robbins.

13. A tract of 20 acres of land in said district forfeited to the State in the name of William Ruyons.

14. A tract of 80 acres in said district forfeited to the State in the name of William Spaulding.

15th. A tract of 12 acres in said district forfeited to the State in the name of William Spaulding.

16th. A tract of 130 acres in said district forfeited to the State in the name of S. S. Vinson.

17th. A tract of 255 acres in said district forfeited to the State in the name of S. S. & F. M. Vinson.

18th. A tract of 619 acres in said district forfeited to the State in the name of S. S. & F. M. Vinson.

19th. A tract of 640 acres in said district forfeited to the State in the name of S. S. & F. M. Vinson.

20. A tract of 513 acres in said district forfeited to the State in the name of S. S. & F. M. Vinson.

21. A tract of 920 acres in said district forfeited to the State in the name of S. S. & F. M. Vinson.

22. A tract of 37 acres in said district forfeited to the State
32 in the name of Thomas Brewster.

23. A tract of 50 acres in said district forfeited to the State in the name of Johnson Brewer.

24. A tract of 6,000 acres in said district forfeited to the State in the name of Count De Fleury's estate.

25. A tract of 32 acres in said district forfeited to the State in the name of Rhoda Evans.

26. A tract of 30 acres in said district forfeited to the State in the name of James Evans.

27. A tract of 35 acres in said district forfeited to the State in the name of A. Maynard's heirs.

28. A tract of 100 acres in said district forfeited to the State in the name of A. Maynard's heirs.
29. A tract of 100 acres in said district forfeited to the State in the name of Cloe McCoy.
30. A tract of 52 acres in said district forfeited to the State in the name of Moses Marcum.
31. A tract of 200 acres in said district forfeited to the State in the name of James Muncy.
32. A tract of 25 acres in said district forfeited to the State in the name of James Muncy.
33. A tract of 82 acres in said district forfeited to the State in the name of Josiah Marcum's heirs.
34. A tract of 50 acres in said district forfeited to the State in the name of Jacob M. Marcum.
35. A tract of 25 acres in said district forfeited to the State in the name of Jacob Marcum.
36. A tract of 101,212½ acres in said district forfeited to the State in the name of Mag Miklin Wigslin.
33 37. A tract of 10 acres in said district forfeited to the State in the name of John Newsom.
38. A tract of 100 acres in said district forfeited to the State in the name of H. C. Ruyon.
39. A tract of 6,300 acres in said district forfeited to the State in the name of B. F. Ruff.
40. A tract of 60 acres in said district forfeited to the State in the name of L. V. Sarton.
41. A tract of 13 acres in said district forfeited to the State in the name of Rhoda Spaulding.
42. A tract of 309½ acres in said district forfeited to the State in the name of F. M. Vinson.
43. A tract of 450 acres in said district forfeited to the State in the name of F. M. Vinson.
44. A tract of 27 acres in said district forfeited to the State in the name of Ali Williamson.
45. A tract of 15 acres in said district forfeited to the State in the name of Ali Williamson.
46. A tract of 50 acres in said district forfeited to the State in the name of Ali Williamson.
47. A tract of 25 acres in said district forfeited to the State in the name of Ali Williamson.
48. A tract of 8 acres in said district forfeited to the State in the name of McCajah Dillon.
49. A tract of 25 acres in said district forfeited to the State in the name of McCajah Dillon.
50. A tract of 50 acres in said district forfeited to the State in the name of Nathaniel Deskins *et al.*
34 51. A tract of 232 acres in said district forfeited to the State in the name of Samuel Davis.
52. A tract of 30 acres forfeited to the State in said district in the name of Joseph Davis.

53. A tract of 25 acres in said district forfeited to the State in the name of Joseph Davis.
54. A tract of 50 acres in said district forfeited to the State in the name of Andrew Dempsey's heirs.
55. A tract of 25 acres in said district forfeited to the State in the name of Andrew Dempsey's heirs.
56. A tract of 107 acres in said district forfeited to the State in the name of E. S. Dempsey.
57. A tract of 100 acres in said district forfeited to the State in the name of Henry Dempsey.
58. A tract of 20 acres in said district forfeited to the State in the name of George W. Davis.
59. A tract of 22 acres in said district forfeited to the State in the name of Samuel Davis.
60. A tract of 32 acres in said district forfeited to the State in the name of Samuel Davis.
61. A tract of 37 acres in said district forfeited to the State in the name of Samuel Davis.
62. A tract of 66 acres in said district forfeited to the State in the name of Richard J. Evans.
63. A tract of 50 acres in said district forfeited to the State in the name of Surilda Lawson.
64. A tract of 75 acres in said district forfeited to the State in the name of Harrison Murphy.
65. A tract of 33 acres in said district forfeited to the State in the name of Samuel Ruyons.
35 66. A tract of 103 acres in said district forfeited to the State in the name of Samuel Ruyons.
67. A tract of 100 acres in said district forfeited to the State in the name of Jesse Parsley.
68. A tract of 265 acres in said district forfeited to the State in the name of James Starr, Sr.
69. A tract of 448 acres in said district forfeited to the State in the name of James Starr, Sr.
70. A tract of 250 acres in said district forfeited to the State in the name of James Starr, Sr.
71. A tract of 30 acres in said district forfeited to the State in the name of Rhoda Stafford.
72. A tract of 43 acres in said district forfeited to the State in the name of S. Stella Thompson.
73. A tract of 55 acres in said district forfeited to the State in the name of Nathan Deskins and others.
74. A tract of 22 acres in said district forfeited to the State in the name of George W. Davis.
75. A tract of 130 acres in said district forfeited to the State in the name of Lewis E. Dempsey.

*Lands Forfeited to the State of West Virginia, Logan District.*

1. 100 acres in the name of John Chambers' heirs.
2. 67 acres in the " " Greenbery Slack.

3. 500 acres in the name of E. Ward and J. Allen.
4. 31 acres " " " William Browning.
5. 100 acres " " " Gordon McNeely.
6. 25 acres " " " William Smith's heirs.
7. 100,000 acres " " Black and Suydam.
8. 375,000 acres " " J. L. Black.

36 9. 200 acres in the name of Milton Burgess.
10. 49 acres " " Hiram Burgess.
11. 128 acres " " Deal & Phillips.
12. 114 acres " " William Ellis.
13. 6,000 acres " " Harriet E. Griswall.
14. 800 acres " " John C. Hanover.
15. 250 acres " " James M. Laidley.
16. 90,000 acres " " Thomas William Mather.
17. 248 acres " " Hiram Mullins *et al.*
18. 40 acres " " James McNeeley & Geo. Smith's heirs.
19. 500 acres " " Enoch Totten.
20. 39½ acres " " Rhoda Bell.
21. 36 acres " " W. V. Vance.
22. 75 acres " " Rebecca Hinchman & T. M. S. heirs.
23. Lot No. 6 " " Jennie Justice.
24. Lot " 7 " " " "
25. 350 acres " " Hiram Mullins.
26. 15½ acres " " Anthonys Lawson's estate.
27. 19 acres " " " " "

*Land Forfeited to the State of West Virginia in Chapmansville District.*

No. 1. 200 acres in the name of John Chambers' heirs.
2. 35 acres in the name of Anthelia Elkins.
3. 18 acres " " Kelly Elkins.
4. 70 acres " " George W. Hager.
5. 125 acres " " S. A. Mullins.
6. 370 acres " " S. A. Mullins.
7. 47 acres " " Sarah McCloud.
8. 12 acres " " Arnold Perry.

37 9. 108 acres in the name of Jerimahia Perry.
10. 150 acres " " Harvey Dingess.
11. 30 acres " " " "
12. 40 acres " " " "
13. 25 acres " " Charles McCloud.
14. 362 acres " " William Perry.
15. 20 acres " " Patton Thompson.
16. 65 acres " " " "
17. 25 acres " " John Workman.
18. 500 acres " " James Conley.
19. 60 acres " " William F. Butcher.
20. 160 acres " " " " "
21. 62 acres " " Jane Dawlton.

22. 90 acres in the name of Wm. R. Ellis's heirs.
23. 50 acres " " Albert Gore.
24. 50 acres " " Polly Ann Gore.
25. 40 acres " " A. J. Mullins.
26. 35 acres " " Peter Mullins.
27. 350 acres " " R. W. Peck.
28. 94 acres " " Moses Tomlin.
29. 50 acres " " Asa Williamson.
30. 110 acres " " Peggy Mounts.

*Land Forfeited to the State of West Virginia in Triadelphia Distr.*

1. 8,320 acres in the name of Reynolds & Whitney.
2. 45 acres " " Malinda Hatfield.
3. 3,115 acres " " Hughes River Oil Company.
4. 2,680 acres " " Ezra Powell.
5. 1,280 acres in the name of Bailey or Brazilla Ransom.

38 6. 1,000 acres in the name of John W. Hall.

7. 4,000 acres " " "
8. 500 acres in the name of Mary A. Hinchman's heirs.
9. 1,715 acres " " N. Y. & Hughes River Oil Co.
10. 170 acres " " Richard Toler's heirs.
11. 5,000 acres " " Harris Hoyt.
12. 5,000 acres " " Jesse R. Irwin.
13. 5,000 acres " " Alvin Irwin.
14. 5,000 acres " " Charles F. Thomas.
15. 30,000 acres " " John Rodgers.
16. 140 acres " " Warren Alderson.
17. 20 acres " " "
18. 61 acres " " J. P. Christian.
19. 1,000 acres " " John W. Hall.
20. 4,000 acres " " John W. Hall.
21. 10 acres " " James A. Justice.
22. 50 acres " " John Perry's estate.
23. 30,000 acres " " John Rodgers.
24. 108 acres " " James A. Spratt.
25. 50 acres " " Maria Toler.
26. 20 acres " " Abner Vance, Sr.

*Lands Forfeited to the State of West Virginia in Magnolia Distr.*

1. 54 acres in the name of John A. Deskins.
2. 18 acres " " "
3. 509 acres " " John W. Deskins.
4. 10 acres " " "
5. 300 acres " " F. M. Hatfield.
6. 100 acres in the name of Wm. Mullins.

39 7. 1,000 acres in the name of Wm. Mullins' heirs.

8. 85 acres " " Christian Cline.
9. 106 acres in the name of Asbery Hurley.
10. 228 acres " " James M. Lawson.

11. 1 acres in the name of Alec Murphy's heirs.
12. 45 acres " " John Mullins.
13. 29 acres " " C. W. Mounts.
14. 70 acres " " Warren Alderson.
15. 267 acres " " Anderson Ferrell.
16. 36½ acres " " Michael Mounts.
17. 15 acres " " Moses Mounts.
18. 150 acres " " " "
19. 125 acres " " Asa McCoy.
20. 194 acres " " C. W. Mounts.
21. 17 acres " " Alexander Trent.
22. 70 acres " " Polly Tiller and E. Mounts.
23. 25 acres " " W. T. Wallis.
24. 78 acres " " Reuben White.

*Lands Forfeited to the State of West Virginia in Lee District.*

1. 40 acres in the name of Geo. F. McCoy.
2. 10 acres in the name of James Starr.
3. 200 acres " " James Taylor.
4. 45 acres " " James H. Evans.

*List of said Lands Not Reported to said Clerk Forfeited for Non-entry for Five Successive Years from* 1869.

1. A tract of 6,000 acres in the name of Count De Fleury *et als.*
2. A tract of 101,212½ acres granted by the Commonwealth of Virginia to William McCleary and forfeited in the name of
40 Mag Miklin Wigslin.
3. A tract of 6,300 acres forfeited in the name of B. F. Ruff.
4. A tract of 100,000 acres forfeited in the name of J. L. Black and Suydam.
5. A tract of 375,000 acres forfeited in the name of J. L. Black and Suydam.
6. A tract of 6,000 acres, part of a survey of 333,000 acres, granted to Levi Hollingsworth by the Commonwealth of Virginia and forfeited in the name of Harriet E. Griswell.
7. A tract of 90,000 acres, parts of two surveys, one of 500,000, granted by the Commonwealth of Virginia to Robert Morris, and the other the above 333,000 acres, and forfeited in the name of Thomas W. Mather.
8. A tract of 8,320 acres forfeited in the name of Reynolds and Whitney.
9. A tract of 2,115 acres forfeited in the name of the Hughes River Oil Company.
10. A tract of 2,680 acres forfeited in the name of Ezra Hall.
11. A tract of 1,280 acres forfeited in the name of Bailey or Barzilia Ransom.
12. A tract of 1,000 acres forfeited in the name of John W. Hall.
13. A tract of 4,000 acres forfeited in the name of John W. Hall.

14. A tract of 1,715 acres forfeited in the name of N. Y. & Hughes River Oil Company.

15. A tract — 38,277½ acres, situate mostly in the districts and Triadelphia, of Logan county, granted by the Commonwealth of Virginia to Richard Smith, assignee of Henry Banks, May 13th, 1796, and forfeited in the name of said Smith.

16. A tract of 100,000 acres, granted by the Commonwealth
41 of Virginia to Wm. McCleary Jan. 21, 1796, situate mostly in the districts of Logan and Hardee, of said county, claimed by John R. Read, trustee, of Philadelphia, Pa., and forfeited in the name of Robert E. Randall, trustee.

17. A tract of 50,000 acres, granted by the Commonwealth of Virginia to James Patton, situate mostly in the district of Hardee and forfeited in the name of James Patton; present claimants unknown.

18. A tract of 174,000 acres, granted by the Commonwealth of Virginia to Benjamin Grayson Orr December 24, 1795, situate mostly in Hardee district, forfeited in the name of Robert E. Randall, trustee, now claimed by John R. Read, trustee.

19. A tract of 101,212½ acres, granted by the Commonwealth of Virginia to William McCleery December 9th, 1795, situate mostly in Hardee district; forfeited in the name of Robert E. Randall, trustee, and now claimed by John R. Read, trustee.

20. A tract of 500,000 acres, granted by the Commonwealth of Virginia to Robert Morris, assignee of William Cary Nicholas, June 23, 1795, situate mostly in Triadelphia district; forfeited in the name of Robert E. Randall, trustee, and now claimed by John R. Read, trustee, and other unknown claimants.

21. A tract of 174,673 acres, granted by the Commonwealth of Virginia to Thomas Rutter and Reuben Etting January 9th, 1896, situate mostly in Triadelphia district; forfeited for non-entry; present claimants unknown.

22. A tract of 142,000 acres, granted by the Commonwealth of Virginia to De Witt Clinton February 19, 1796, situate mostly in Logan and Triadelphia districts; forfeited for non-entry. Last claimed by R. W. De Forest and L. W. Knox, executors of the last will and testament of Burr Wakeman, both of the city of
42 New York, and Helen M. Cunningham, and the unknown heirs of Samuel Benedict.

23. A tract of 50,096 acres, granted by the Commonwealth of Virginia to Edward Dillon April 16th, 1796, situate mostly in Tridelphia district; claimed by Charles Reader.

24. A tract of 187,000 acres, granted by the Commonwealth of Virginia to George K. Taylor November 2, 1896, situate mostly in Magnolia and Lee districts; claimed by unknown parties; forfeited for non-entry.

25. A tract of 213,000 acres, granted by the Commonwealth of Virginia to George K. Taylor November 2, 1796, situate mostly in Lee, Magnolia, and Logan districts; forfeited for non-entry; present claimants unknown.

26. A tract of 58,000 acres, granted by the Commonwealth of Vir-

ginia to James M. Benoist May 3, 1796, situate mostly in Chapmansville and Logan districts; forfeited in the name of John J. Benoist, his heirs or assigns; present claimants unknown.

27. A tract of 30,000 acres, granted by the Commonwealth of Virginia to John Green December 15, 1796, situate mostly in Magnolia and Lee districts; forfeited for non-entry; present claimants unknown.

28. A tract of 500 acres, situate on Copperas Mine fork of Island creek, granted by the Commonwealth of Virginia to Patrick King about 1860, and forfeited in his name; present claimants unknown.

29. A tract of 500 acres, situate on the Copperas Mine fork of Island creek, granted by the Commonwealth of Virginia to John H. Goddard about 1860; forfeited in his name; present claimants unknown.

30. A tract of 333,000 acres, situate mostly in Logan county, granted by the Commonwealth of Virginia to Levi Hollingsworth *et al.*, and forfeited in his name; present claimants unknown.

31. A tract of 84,000 acres, situate mostly in Magnolia
43 district, granted by the Commonwealth of Virginia to John Green, and forfeited to the State of West Virginia in his name.

32. A tract of 100,000 acres, location unknown, forfeited to the State of West Virginia in the name of and claimed by the Pittsburgh National Bank of Commerce.

Your commissioner recommends that a suit in chancery be brought and prosecuted in the name of the State of West Virginia in order that a sale may be made of all such parts of the said tracts and parcels of land as are liable to be sold for the benefit of the school fund.

This August 1st, 1891.

E. B. BUSKIRK,
*Commissioner of School Lands.*

STATE OF WEST VIRGINIA, } *To wit:*
*Logan County,* }

I, T. C. Whited, clerk of the circuit court of said county, do hereby certify that the foregoing is a true copy of the annual report of U. B. Buskirk, commissioner of school land for Logan county, West Virginia, as appears from the records of my office.

Given under my hand and seal of said court this 28th day of October, 1895.

T. C. WHITTED, *Clerk.*

A copy.
Teste: —— ——,
*Clerk Circuit Court U. S., D. W. Va.*

To the introduction of which order and report or either of them or any part thereof in evidence plaintiff, by his counsel, then and there objected upon the ground that the same are not the best evi-

dence or any evidence of the forfeiture of the land claimed
44 by plaintiff; that the said report is not in conformity with
any law; but the court overruled said objection of plaintiff and permitted the said order and report to be read in evidence to the jury; to which ruling of the court in admitting said order and report in evidence plaintiff, by his counsel, then and there excepted and prayed that said exception be saved to him and signed and sealed and made part of the record in this cause, which is accordingly done and signed and sealed and made part of said record, which is the plaintiff's third bill of exception.

NATHAN GOFF. [SEAL.]

*Plaintiff's Bill of Exceptions No. 4.*

HENRY C. KING
*v.*
SIMON S. ALTIZER *et al.* } Ejectment.

Be it remembered that on the trial of this cause and after the matters stated in plaintiff's first, second, and third bill of exceptions the defendants, to maintain the issue on their part, offered in evidence, to be taken in connection with the auditor's certificate mentioned in plaintiff's first bill of exceptions and in connection with the order and report mentioned in plaintiff's third bill of exceptions, a certified copy of an order of the circuit court of Logan county, West Virginia; which said order is in words and figures following, to wit:

At a circuit court continued and held for Logan county, at the court-house thereof, on Saturday, August 1st, 1891.

Present: The Hon. Thomas H. Harvey, judge of said court.

U. B. Buskirk, commissioner of school lands for the county of Logan, this day made his report to this court, containing a list of
45 all the tracts and parcels of land lying wholly and in part within this county which have heretofore been reported in the manner required by law to the clerk of this court by the auditor of this State as forfeited and liable to be sold for the benefit of the school fund of this State under the constitution and laws of this State, and also a list of forfeited lands lying wholly and in part within this county which, in his opinion, are liable to be sold for the benefit of the school fund of this State, which have not been so reported to said clerk by said auditor; all of which said lands the said commissioner of school lands suggests and recommends to the court should be sold under and by virtue of a suit in chancery to be brought and prosecuted in the name of the State of West Virginia under the provision of chapter 105 of the Code of West Virginia.

And the court being of the opinion that it is right and proper that such suit should be brought and prosecuted in the name of the State of West Virginia against the several persons interested in

said tracts and parts of tracts and each of them, either as former owners of claimants or occupants or otherwise—

And where any such persons are unknown against the unknown claimants thereof, as required and directed by said chapter of said code—

It is therefore adjudged, ordered, and decreed that suit in chancery be commenced and prosecuted in the name of this State for the sale of the said lands mentioned in said report against the said persons above indicated, which suit shall be conducted and prosecuted in accordance with the provisions of said chapter.

STATE OF WEST VIRGINIA, *Logan County,* } *To wit:*

I, T. C. Whited, clerk of the circuit court of said county, do
46 hereby certify that the foregoing is a true copy of the order filing the annual report of the com'r of school lands of Logan Co. for the year 1891 and directing suit, as appears from the records of my office.

Given under my hand and seal of said court this the 28th day of October, 1895.

[COURT SEAL.] T. C. WHITED, *Clerk.*

To the introduction of which decree in evidence plaintiff, by counsel, then and there objected upon the ground that said decree does not constitute or work a forfeiture of the land claimed by plaintiff and is not the best evidence or any evidence of such forfeiture; that said decree was not made in any suit or proceeding to which plaintiff or any person under whom he claims was a party; that said decree is not and was not authorized by law, and the said court had no jurisdiction or authority to pronounce or enter the same; which objection of plaintiff the court overruled and allowed said decree to be read in evidence to the jury; to which ruling of the court plaintiff, by counsel, then and there excepted and prayed that his said exception be saved to him and signed, sealed, and made part of the record of this cause, which is accordingly done and signed, sealed, and made part of the record, and is plaintiff's fourth exception.

NATHAN GOFF. [SEAL.]

*Plaintiff's Bill of Exceptions No. 5.*

HENRY C. KING *v.* SIMON S. ALTIZER *et al.* } Ejectment.

Be it remembered that on the trial of this cause and after the matters stated in plaintiff's first, second, third, and fourth bills of exceptions and after defendants had rested their case the
47 plaintiff, to prove that no forfeiture of the land or outstanding title thereto existed in or was claimed by the State of West

Virginia, and that there was no record of any forfeiture of said land where the same would be found if any such forfeiture did exist, introduced and read in evidence a certificate of the auditor of the State of West Virginia, dated Oct. 30th, 1895; which certificate is in words and figures following, to wit:

STATE OF WEST VIRGINIA:

AUDITOR'S OFFICE, CHARLESTON.

I, Isaac V. Johnson, auditor of the State of West Va., do certify that I have carefully examined the record books of forfeited lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, in said State, from and including the year 1883 to this date, 1895, and there does not appear on said record books a tract of 500,000 acres of land or any part thereof or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, Jno. R. Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of forfeited lands of this office for either or any of said years in the name of either or any of the said parties.

I do further certify that I have carefully examined the record books of delinquent lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, in said State, from and including the year 1883 to this date, 1895, and there does not appear on said record book a tract of 500,000 acres of land or any part thereof or any other
48 tract delinquent for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, John R. Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of delinquent lands of this office for either or any of said years in the name of either or any of said parties.

Given under my hand and official seal this 30 day of Oct., 1895.

I. V. JOHNSON,

[SEAL.] *Auditor of West Virginia.*

That the plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claims title, and proved further that plaintiff was a purchaser of said tract of land for valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia or of any of the facts set out in the auditor's certificate shown and referred to in plaintiff's first bill of exceptions, except such notice as the land books and records duly kept disclosed.

That thereupon plaintiff rested his case and the defendant did the

like; whereupon, at the instance of the defendants, the court instructed the jury as follows:

"The jury are instructed that the title to the land claimed by the plaintiff, granted to one Robert Morris by the Commonwealth of Va. by patent dated June 23rd, 1795, was (prior to the date of the deed made by John V. Le Moyne to Henry C. King, under
49 which the plaintiff now claims), under the provisions of the constitution of the State of West Va., forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To which instruction plaintiff, by his counsel, objected upon the ground that said provisions of the constitution of the State of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to wit, article XIV, sec. 1, of the amendments thereto, and other paramount and control-ing provisions of said State constitution, to wit, art. III, sec. 4, 5, 9, 10, 20, art. V, sec. 1, of the said constitution of the State of West Virginia, and upon the further ground that if there were a forfeiture of the said land to said State and an outstanding title thereto in said State it could not be set up against plaintiff in this action, who is a purchaser for value without knowledge or notice of such forfeiture or of outstanding title; but the court overruled plaintiff's said objection and gave said instruction; to which ruling of the court in giving said instruction plaintiff, by his counsel, upon the grounds aforesaid, excepted, which is his second exception, and asked that said exception be saved to him and signed, sealed, and made a part of the record; and thereupon the jury, in accordance with said instruction of the court, proceeded to render a verdict, which is in the following words and figures, to wit:

"We, the jury, by direction of the court, find the defendants M. B. Mullins, Alexander McClintock, and John McClintock not guilty.

A. J. SMITH, *Foreman.*"

And the court thereupon proceeded to enter judgment upon the said verdict; which judgment is in the following words and
50 figures, to wit:

"This day came again the parties, by their counsel, and thereupon the defendants, by their counsel, moved the court to render judgment upon the verdict of the jury rendered on the 30th day of January, 1896.

"It is therefore considered by the court that the plaintiff take nothing by his bill, but, for his false clamour, be in mercy, &c., and that the defendants go thereof without day and recover of the said plaintiff their costs by them about their defense in this behalf expended."

To which rulings and action of the court the plaintiff, by his counsel, objected and excepted, and asked that said objections and

exceptions be saved to him and signed, sealed, and made a part of the record in said cause, all of which is accordingly done and signed, sealed, and made part of said record.

NATHAN GOFF. [SEAL.]

And at another day, to wit, on the 20th day of March, 1896, the following order was made and entered of record, to wit:

HENRY C. KING
*vs.*
M. B. MULLINS, ALEXANDER MCCLINTOCK, and JOHN MCCLINTOCK. } In Ejectment.

This day came the parties, by their counsel, and the plaintiff filed his petition in this court praying a writ of error to operate as a supersedeas from the judgment entered herein on the 27th day of February, 1896. It is ordered that said writ of error be accordingly allowed, to operate as such supersedeas, upon the plaintiff entering into a bond in the penalty of four thousand dollars, conditioned according to law, with security to be approved by the court.

51 *Petition for Writ of Error and Assignment of Errors.*

HENRY C. KING, Plaintiff in Error,
*vs.*
M. B. MULLINS, ALEXANDER MCCLINTOCK, and JOHN MCCLINTOCK, Defendants in Error. } In Ejectment.

Petition for writ of error and assignment of errors.

To the honorable the justices of the Supreme Court of the United States:

Your petitioner, Henry C. King, respectfully represents unto your honors—

That he is aggrieved by a final judgment of the circuit court of the United States for the district of West Virginia, fourth judicial circuit, rendered on the 27th day of February, 1896, against your petitioner and in favor of M. B. Mullins, Alexander McClintock, and John McClintock in an action then pending in said court entitled Henry C. King *vs.* Simon S. Altizer *et als.*, recently tried as to said defendants in error only, which judgment petitioner charges to be erroneous and against the just rights of petitioner.

And your petitioner makes the following assignment of errors committed by said circuit court to the prejudice of plaintiff, this petitioner, upon the trial of said cause, which will further and more fully appear from plaintiff's bills of exceptions made part of the record in said cause:

1st. The court erred in admitting in evidence to the jury on behalf of defendants and against plaintiff's objection, for the purpose of defeating the title shown by plaintiff to the land in controversy by showing that the title to said land had been forfeited to and was

vested in the State of West Virginia, the certificate of the
52 auditor of the State of West Virginia purporting or tending to show that said land had not been entered upon the land books of the counties where the same is situated in the name of plaintiff or of those under whom he claims since the year 1883, because such fact, if it be one, cannot operate to divest plaintiff or those under whom he claims of title to said land and because said certificate is no proof or evidence of such divestiture.

2d. The court erred in admitting in evidence to the jury on behalf of defendants and against plaintiff's objection, for the purpose of showing the forfeiture and divestiture of plaintiff's title, copies of an order of the circuit court of West Virginia for the county of Wyoming appointing E. M. Senter commissioner of school lands for said county and the report of said commissioner purporting to be a report of the forfeited lands of his county, said report being ineffectual to constitute and incompetent to prove and not proving and not being the best evidence or any evidence of forfeiture or divestiture of the title to said land.

3d. The court erred in like manner in admitting in evidence to the jury on behalf of defendants and against the objection of plaintiff copies of a like order of the circuit court of West Virginia for the county of Logan appointing U. B. Buskirk commissioner of school lands for said county and the like report of said commissioner purporting to be a report of the forfeited lands in his county.

4th. The court erred in admitting in evidence to the jury on behalf of defendants and against the objection of plaintiff a copy of an order of the said circuit court for Logan county directing suit to be brought and prosecuted in the name of the State of West Virginia to sell the lands mentioned in the said report of said commissioner of school lands for Logan county, it not appearing that said
53 lands were ever sold or were liable to be sold, or that any suit was ever brought for that purpose, and the said order being not the best nor any evidence that plaintiff's title to the land in controversy was forfeited or divested out of him or out of any person under whom he claims.

5th. The court erred in instructing the jury on behalf of defendants and against the objection of plaintiff "that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Virginia by patent dated June 23d, 1795, was (prior to the date of the deed made by John V. Le Moyne to Henry C. King, under which plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to the said land," because the said provisions of said State constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to land out of the owner and vest the same in the State or in some other person for the failure of the owner of such land to cause the same to be entered upon the land books are wanting in due process of law and are repugnant to and in conflict with article XIV, section 1, of the amendments to the Constitution of the United States

and are in conflict with and repugnant to paramount and controlling provisions of said State constitution, viz., Art. III, sections 4, 5, 9, 10, 20, and Art. V, section 1, and are therefore null and void.

6th. The court erred in instructing the jury against plaintiff's objection that by reason of the forfeiture thereof "plaintiff took and has no title to said land," there being no evidence of any such forfeiture, and it being proven by the certificate of the auditor of West Virginia that said land did not appear and was not to be found upon the record book of "lands forfeited for any cause" to
54 said State kept by him and required by law to be kept by him in his office, and it being further proven that plaintiff purchased said land for valuable consideration and without knowledge or notice of any alleged or pretended forfeiture thereof or of any facts upon which such forfeiture might be claimed or predicated.

7th. The court erred in instructing the jury, upon the evidence offered in this cause, that a forfeiture had occurred whereby the plaintiff or any one under whom he claims was divested of his title to said land, and in directing the jury to find a verdict for the defendants, because upon the evidence under the Constitution there is nothing to warrant the jury in finding such verdict or the court in giving such direction.

8th. The court erred in instructing the jury to find their verdict for the defendants, the plaintiff having shown a right to recover and the defendants having failed to make out any defense.

9th. The court erred in causing judgment to be entered for defendants upon said verdict.

And petitioner says that the value of the matter in controversy in this cause exceeds five thousand dollars, exclusive of interest and costs, and that said cause is one that involves the construction and application of the Constitution of the United States and in which the constitution of a State is claimed to be in contravention of the Constitution of the United States.

Wherefore your petitioner prays that a writ of error issue out of your honors' court to the said circuit court of the United States for the district of West Virginia to bring before your honors the record of said cause of Henry C. King *vs.* Simon S. Altizer *et als.*, so far as the same relates to said defendants in error, and that the judgment of said circuit court entered in said cause as aforesaid on the
55 27th day of February, 1896, be by your honors reviewed and reversed.

And petitioner will ever pray, etc.

HENRY C. KING,
*By Counsel.*

MAYNARD F. STILES,
F. L. BUTTRICK,
H. K. SHUMATE,
DANIEL TRIGG, *Sol's.*

*Bond.*

And on the same day, to wit, on the 20th day of March, 1896, the plaintiff in error filed his bond; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Henry C. King, as principal, and Sidney D. Freshman, as surety, both of the city and county of New York, are held and firmly bound unto M. B. Mullins, Alexander McClintock, and John McClintock in the full and just sum of four thousand dollars, to be paid to the said M. B. Mullins, Alexander McClintock, and John McClintock, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a circuit court of the United States for the district of West Virginia, in a suit depending in said court between Henry C. King, plaintiff, and Simon S. Altizer and others, defendants, tried as to M. B. Mullins, Alexander McClintock, and John McClintock, a judgment was rendered against the said Henry
56 C. King, plaintiff as aforesaid, and the said Henry C. King, plaintiff as aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said M. B. Mullins, Alexander McClintock, and John McClintock to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry C. King shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

H. C. KING. [SEAL.]
S. D. FRESHMAN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—

J. J. JACKSON,
*U. S. Dist. Judge.*

March 20, '96.

And on the same day, to wit, on the 20th day of March, 1896, was allowed and filed the following:

*Writ of Error.*

The Supreme Court of the United States.

The President of the United States of America to the judges of the circuit court of the United States for the district of West Virginia:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, be-
57 fore you or some of you, between Henry C. King, plaintiff, and M. B. Mullins, Alexander McClintock, and John McClintock, defendants, a manifest error hath happened, to the great damage of the said Henry C. King, plaintiffs as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

J. J. JACKSON,
*U. S. District Judge.*

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of March, 1896, and in the
[SEAL.] 120th year of the Independence of the United States of America.

L. B. DELLICKER,
*Clerk C. C. U. S., D. W. Va.*

58 THE UNITED STATES OF AMERICA:

To M. B. Mullins, Alexander McClintock, and John McClintock, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, in a certain suit in ejectment wherein Henry C. King is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, judge of the district court of the United States, dist. West Va., this twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

{ Seal Circuit Court United States, District West Virginia, at Parkersburg, West Va. }

J. J. JACKSON,
*U. S. Dist. Judge.*

58½ [Endorsed:] Served within citation March 28, 1896, by delivering a duly attested copy thereof to M. B. Mullins, in Logan county, W. Va. Served on Alexander McClintock and John McClintock by delivering copy to Z. T. Vinson, their attorney, at Huntington, they being not found within my district. Chas. E. Wells, U. S. M., by G. W. Hatfield, dep. U. S. M.

59 THE UNITED STATES OF AMERICA:

To M. B. Mullins, Alexander McClintock, and John McClintock, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia in a certain suit in ejectment wherein Henry C. King is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, judge of the district court of the United States, dist. West Va., this twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

{ Seal Circuit Court United States. District West Virginia, at Parkersburg, West Va. }

J. J. JACKSON,
*U. S. Dist. Judge.*

A copy.
Attest: L. B. DELLICKER, *Clerk.*

Service of within accepted this 7th day of April, 1896.
VINSON & THOMPSON,
*Att'ys for Alex. McClintock and Jno. McClintock.*

60 UNITED STATES OF AMERICA, *District of West Virginia,* } *To wit:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, hereby certify that the foregoing is a true transcript of so much of the record in the cause in eject-

ment of Henry C. King *v.* Simon S. Altizer *et al.*, pending in said court and tried as to the defendants M. B. Mullins, Alexander McClintock, and John McClintock, as was asked for by the plaintiff, together with the original citation, with its returns, made part hereof.

Given under my hand and the seal of said court, at Parkersburg, in said district, this 15th day of April, 1896, and in the 120th year of the Independence of the United States of America.

Seal Circuit Court United States, District West Virginia, at Parkersburg, West Va.

L. B. DELLICKER,
*Clerk C. C. U. S., D. W. Va.*

Endorsed on cover: Case No. 16,257. West Virginia C. C. U. S. Term No., 491. Henry C. King, plaintiff in error, *vs.* M. B. Mullins, Alexander McClintock, and John McClintock. Filed April 16, 1896.

U. S. Sup. Ct.
Brief of Stiles for P. C.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Filed January 9, 1897.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 491.

Office Supreme Court, U. S.
FILED.
JAN 9 1897
JAMES H. McKENNEY,
CLERK.

HENRY C. KING, *Plaintiff in Error*,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK, *Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

MAYNARD F. STILES, Counsel for Plaintiff in Error.

(16,257)

# BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1896.

No. 491.

HENRY C. KING, *Plaintiff in Error*,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK, *Defendants in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

## STATEMENT.

At rules held March 4th, 1895, in the office of the Clerk of the Circuit Court of the United States for the District of West Virginia, at Charleston, Henry C. King, plaintiff in error here, filed his declaration of ejectment (record, p. 1) against one Simon S. Altizer and sundry others, including these defendants in error, M. B. Mullins, Alexander McClintock and John McClintock, to recover possession of the land mentioned in said declaration, being the West Virginia portion of a tract of 500,000 acres of land granted to Robert Morris, June 23rd, 1795, by the Commonwealth of Virginia, lying at that time in Virginia and that portion of Kentucky then in dispute between said two States, a portion of said tract lying now in the District of West Virginia in the Counties of Logan, Mingo, Wyoming and McDowell, and the remainder in Kentucky and Virginia. On July 8th, 1895, an order was entered (p. 8) transferring the cause to Parkersburg, for trial, and on the 16th day of October, 1895,

came the said defendants, M. B. Mullins, Alexander McClintock and John McClintock, severed from the other defendants named in the declaration, entered their plea of not guilty, and the cause came on for trial as to said three defendants (p. 8), and continued on trial for thirty days, the jury disagreeing and being discharged (p. 9) November 15th, 1895.

On the 14th day of January, 1896, the cause came on again for trial as to said three defendants (p. 9), the Hon. Nathan Goff, Circuit Judge, presiding, and continued on trial until January 30th, 1896, when the jury, by direction of the Court, returned a verdict for defendants (p. 11), and on February 27th, 1896, judgment was entered for defendants (p. 12) and on the same day plaintiff tendered his bills of exceptions (pp. 12 to 31) which were allowed by the Court and filed.

On March 20th, 1896, plaintiff presented his bond and petition for writ of error from this Court (p. 32) with assignment of errors, and writ of error and citation were that day awarded (p. 36) and bond received, approved and filed (p. 35).

The record was filed and cause docketed in this Court, April 16th, 1896, and on Nov. 20th, 1896, stipulation for submission upon printed arguments was entered into by Counsel for the respective parties.

Upon the trial plaintiff offered in evidence a copy of the grant from Virginia to Robert Morris, certified from the Register of the Virginia Land Office, (p. 12), proved the location of said grant, proved that by sundry mesne, conveyances and legislative and judicial proceedings, offered in evidence, the title of said Robert Morris had become vested, in 1866, in Robert E. Randall, trustee appointed that year by the Courts of Virginia and West Virginia, and on the 29th day of June, 1886, was vested in John R. Read, appointed successor in trust to said Randall, by decrees of said Courts and by decree of the United States Circuit Court for the District of West Virginia, and that by virtue of sundry mesne, conveyances by said Read, trustee, David W. Armstrong and John V. LeMoyne, the title to said land had passed to plaintiff King, December 27, 1893. Plaintiff further proved that defendants were in possession, claiming title, at the time suit was brought and at the time of trial.

Plaintiff having shown a right to recover, defendants to defeat that right, sought to show an outstanding title in the State of West Virginia by the forfeiture of the title claimed by plaintiff, by reason of the alleged non-assessment of the land for tax-

es, and for that purpose offered in evidence a certificate of the State Auditor (p. 14), purporting to show that none of the persons under whom plaintiff claims title as above shown, and certain other persons mentioned in the certificate, who had been beneficiaries of the trust, had had the land entered on the land books of the counties in which the same is situated, or had paid taxes thereon, or had been charged with taxes on the land from the year 1883 to 1894; to the introduction of which certificate in evidence, plaintiff objected on the ground that the same was not the best evidence, or any evidence of forfeiture of the land claimed by plaintiff, or of any outstanding title, or of any fact material to the issue in said cause. To the admission of this certificate, plaintiff takes his Bill of Exceptions No. 1 (p. 12). Defendants next offered a certified copy of an order of the Wyoming County Circuit Court, appointing E. M. Senter, Commissioner of School Lands for that county (p. 13), and copy of his annual report for the year 1894 (p. 16), and copy of a similar order of the Circuit Court for Logan County, appointing U. B. Buskirk, Commissioner of School Lands for that county, (p. 18-19) and copy of his annual report for 1891 (p. 19), to be taken in connection with said certificate, to the introduction of which in evidence, plaintiff objected on the ground that they were not the best evidence or any evidence of forfeiture and were not made in conformity with law or authorized by law. They were admitted and read in evidence and plaintiff takes Bills of Exceptions No. 2 (p. 15) and No. 3 (p. 18). Lastly defendants offered copy of an order of said Logan County Circuit Court, directing a suit to be brought and prosecuted in the name of the State of West Virginia against all persons interested in the land mentioned in the report of Commissioner Buskirk for the sale of the said lands (p. 28). To the introduction of such order in evidence, plaintiff objected on the ground that it did not constitute a forfeiture and was not evidence of any forfeiture of plaintiff's land and was not made in any proceeding to which plaintiff or any one under whom he claimed was a party; that the same was not authorized by law and that the Court had no jurisdiction to pronounce or enter it. The objection was overruled and plaintiff took his Bill of Exceptions No. 4 (p. 28).

In rebuttal of said alleged forfeiture and outstanding title, and to show that no forfeiture existed or was claimed by the State of West Virginia, plaintiff offered and read in evidence a certificate of the said Auditor of West Virginia, that he had examined

the record books of forfeited lands returned and kept by him in his office as required by law, for said counties of Logan, Mingo, Wyoming and McDowell, from and including the year 1883 to date, October 30th, 1895, and that there did not appear upon said books the tract of land in question or any part of it or any land forfeited for any cause in the name of plaintiff or of any of the persons under whom he claims title as aforesaid; that there were no lands from any of said counties entered on said record of forfeited lands, for any of said years, in the name of any of said persons; and that the said land did not, nor did any part of it, appear, nor had any land been entered, in the name of plaintiff or any of said persons, upon the record books of lands delinquent for any cause, kept by him as required by law for said counties, for said years, (p. 30); and proved payment by Randall, trustee, under whom plaintiff claims, of all taxes charged and chargeable upon said land prior to and including the year 1883, and that he, plaintiff, was a purchaser of said land for valuable consideration without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia, or of any of the matter set out in the Auditors certificate offered in evidence by defendants, "except such notice as the land books and records duly kept" disclosed (bottom p. 30).

This closed the evidence, and at request of defendants and against plaintiff's objection, the court instructed the jury that the title to the land claimed by plaintiff was, prior to the date of the deed from LeMoyne to plaintiff, forfeited to and vested in the State of West Virginia, under the provisions of the constitution of said State, and was so forfeited when this suit was instituted, and that plaintiff therefore took and had no title to said land; and directed the jury to render a verdict in favor of defendants (p. 31) which was done and judgment entered accordingly. Plaintiff objected to said instruction on the ground that the provisions of the Constitution of the State of West Virginia for the forfeiture of land are repugnant to and in conflict with the Constitution of the United States, viz.: Act XIV, Sec. 1 of the Amendments thereto, and other paramount and controling provisions of the Constitution of said State of West Virginia, viz.: Art. III, Secs. 4, 5, 9, 10, 20 and Art. V, Sec. 1; and upon the further ground that if there were a forfeiture of said land to the State, it could not be set up against plaintiff in said action, who was a purchaser for value without knowledge or notice of such forfeiture or outstanding title.

Plaintiff's objection to the instructions of the Court is noted in Bill of Exceptions No. 5 (p. 29). All said proceeding appears more fully in plaintiff's Bills of Exceptions Nos. 1 to 5, pages 12 to 31 of the record.

The final questions that are presented by the record are:

1st. Whether or not the provision in the Constitution of West Virginia for the forfeiture of land for non-assessment for five consecutive years, since the year 1869, is in conflict with the Constitution of the United States, or are otherwise invalid; and if not,

2nd. Whether a forfeiture can be enquired of and established collaterally as in the trial of this action of ejectment, there having been no previous determination on behalf of the State or otherwise; and if so,

3rd. Whether a forfeiture of the land claimed by plaintiff in this action, has been proven by proper evidence; and,

4th. Whether, such forfeiture existing and being proven, it can avail defendants and defeat the title of a subsequent purchaser for value and without knowledge or notice of the forfeiture.

Numerous other questions arose upon the trial, but were eliminated by the final action of the Court and do not come up with this record.

## SPECIFICATION OF ERRORS.

Plaintiff in Error maintains that said judgment of the said Circuit Court is erroneous and against the just rights of plaintiff in said cause, this plaintiff in error, and specifies the following errors committed by said Circuit Court to the prejudice of plaintiff, upon the trial of said action in said Court.

First:—The said Court erred in admitting in evidence to the jury on behalf of defendants and against the objection of plaintiff, a certificate of the Auditor of the State of West Virginia purporting or tending to show that the plaintiff, or those under whom he claims title to the land in controversy, had not had the same entered upon the land books of the counties wherein the same is situated, or paid taxes thereon, or been charged on said land books with state taxes on said land, since the year 1883; for the purpose of defeating the title shown by plaintiff to said land, by showing that the same was forfeited to and vested in the said State of West Virginia; because the facts stated in said

certificate, if they be facts, could not operate to divest plaintiff or those under whom he claims, of title to said land or work any forfeiture thereof, and because said certificate is no proof or evidence of such divesture or forfeiture, and is not competent to be offered in evidence of forfeiture, or of the matters contained in said certificate.

Second:—The said Court erred in admitting in evidence to the jury on behalf of defendants and against plaintiff's objection, for the purpose of showing the forfeiture and divesture of plaintiff's title, copies of an order of the Circuit Court of West Virginia for the County of Wyoming, appointing E. M. Senter commissioner of school lands for said county, and the report of said Commissioner purporting to be a report of the forfeited lands of his county; said report being ineffectual to constitute and incompetent to prove and not proving and not being the best evidence nor any evidenee of forfeiture or divesture of the title to said land.

Third:—The said Court erred in like manner in admitting in evidence to the jury, on behalf of defendants and against the objection of plaintiff, copies of a like order of the Circuit Court of West Virginia for the County of Logan, appointing U. B. Buskirk commissioner of school lands for said county, and the like report of said commissioner purporting to be a report of the forfeited lands in his county.

Fourth:—The Court erred in admitting in evidence to the jury,on behalf of defendants and against the objection of plaintiff, a copy of an order of the said circuit court for Logan County, directing suit to be brought and prosecuted in the name of the State of West Virginia, to sell the lands mentioned in the said report of said commissioner of school lands for Logan county, it not appearing that said lands were ever sold or were liable to be sold, or that any suit was ever brought for that purpose, and the said order being not the best nor any evidence that plaintiff's title to the land in controversy was forfeited or divested out of him or out of any person under whom he claims, and said order not being made in any suit or proceeding in which plaintiff or any person under whom he claims was a party, and the said court having no jurisdiction or authority to enter the said order.

Fifth:—The said Court erred in admitting in evidence to the jury, against plaintiff's objection, all or any of the said certificates, orders and reports offered by defendants for the purpose of establishing or enforcing a forfeiture to the State, of the title

claimed by plaintiff, because it is not competent to establish or enforce a forfeiture in a collateral suit or action like the present one.

Sixth:—The Court erred in instructing the jury on behalf of defendants and against the objection of plaintiff, "that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Virginia by patent dated June 23rd, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which plaintiff now claims), under the provisions of the Constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to the said land;" because the said provisions of the Constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to land out of the owner and vest the same in the State or in some other person, when such owner shall not have been charged with state taxes on said land for any five successive years since the year 1869, are wanting in due process of law and are in conflict with the Constitution of the United States, viz.: with Article I, sec. X, 1 thereof and Articles VIII and XIV, section 1, of the Amendments thereto, and are also in conflict with, and are repugnant to, paramount and controling provisions of the State Constitution, viz.: Article I, section 3; Article III, sections 4, 5, 9, 10, and Article V, section 1, and are therefore null and void.

Seventh: The said Court erred in instructing the jury, against plaintiff's objection, that by reason of forfeiture, "plaintiff took and had no title to said land," because there was, and could be, no forfeiture thereof, and there was no evidence of any forfeiture, and it being shown and proven by the certificate of the Auditor of West Virginia, that said land did not appear, and had not been entered, upon the record books of "lands forfeited for any cause" to the State, kept by him in his office, as required by law, from a time long prior to the pretended forfeiture down to a time subsequent to the bringing of said suit; and it being further proven that plaintiff was a purchaser of said land for valuable consideration, after the alleged forfeiture and without knowledge or notice of any alleged or pretended forfeiture, or of any of the matters upon which defendants claim that a forfeiture has occurred.

Eighth: The said Court erred in instructing the jury on account of alleged forfeiture of the title to the land claimed by

plaintiff, to render their verdict in favor of defendants; because no such forfeiture was a lawful defense to plaintiff's suit and title, plaintiff being an innocent purchaser and owner of said land.

Ninth: The said Court erred in instructing the jury that the title claimed by plaintiff to said land was or had been forfeited, because said title was an absolute, unconditional, fee simple title and was not capable or susceptible of being forfeited.

Tenth: The said Court erred in instructing the jury, upon the evidence offered in this cause, that a forfeiture had occurred whereby the plaintiff or any one under whom he claims was divested of his title to said land, and in directing the jury to find a verdict for the defendants, because upon the evidence, under the Constitution, there was nothing to warrant the jury in finding such verdict, or the Court in giving such direction; and because plaintiff 's title to said land is derived under the laws of Virginia, and by the provision of Art. XIII, sec. 1 of the Constitution of West Virginia, is to be determined by the laws in force in the state of Virginia prior to the adoption of said Constitution, at which time there was no law in Virginia for the forfeiture of land.

Eleventh: The said Court erred in instructing the jury to find their verdict for the defendants, the plaintiff having shown a right to recover and the defendants having failed to make out any defense.

Twelfth: The said Court erred in causing judgment to be entered for defendants upon said verdict.

*Points of Law and Fact.*

## ARGUMENT.

Upon the trial plaintiff established title in himself and ouster by defendants (p. 12-13-14) and his consequent right to recover, and was entitled to a verdict and judgment, unless it was fully proven by legal and competent evidence, properly admitted, that the title he claimed was legally and absolutely forfeited and divested out of his predecessor in title, under whom he claimed, at the time of his purchase, and remained divested, and that, at the time of his purchase of the land, plaintiff had constructive notice of such forfeiture and divesture, from "the land books and records duly kept," it being conceded by the court (p. 30) that he had no other notice, and that, but for such notice, if any,

he was an innocent purchaser. The defense offered by defendants was, that the title was forfeited before suit was brought and before plaintiff's purchase.

Plaintiff in error contends that said title was not forfeited at the time of his purchase nor since; that the documents offered by defendants to prove forfeiture were incompetent for the purpose and were improperly admitted in evidence; that they do not prove or tend to prove a divestiture or forfeiture of the title; that plaintiff is an innocent purchaser, and that such forfeiture, if existing and proven, could not avail defendants against plaintiff; that a forfeiture cannot be established collaterally as here attempted; and that the provisions of the State Constitution upon which defendants and the court below based the claim of forfeiture are utterly invalid and void.

In the foregoing Specification of Errors, I have followed the order in which the alleged errors occured, but in this discussion I shall, for convenience, depart from that order.

The provisions of the Constitution of the State of West Virginia for the so called forfeiture of land, under which the tract of land in controversy is charged to be forfeited, and the only provision for forfeiture of any kind in the Constitution, are embraced in the following:

ARTICLE XIII.

LAND TITLES.

1. All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect.

2. No entry by warrant on land in this State shall hereafter be made.

3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during

such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims has, or shall have paid all State taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant, if it shall have issued since that year; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years after the year 1865, and have paid all State taxes charged or chargeable thereon for said period.

4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

5. The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter.

6. It shal be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: *Provided*, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited.

The first constitution of West Virginia was adopted in the

year 1863 and the existing one in the year 1872, being in large measure a transcript from the former and from the Constitution of the United States, which, and the laws and treaties made in pursuance thereof, it declares in its first Article and paragraph, shall be the supreme law of the land.

The usual and legitimate subjects of constitutional concernment, principles of social organization and popular government, the establishment of the just relation between the State and the citizens in an age of enlightened civil liberty, are dealt with in both the earlier and the later constitution: but only in the latter and at the end thereof, as if inserted by stealth after the general business of the convention had been transacted and all but schemers had gone, appears this forfeiture provision, in irreconcilable conflict with the letter and spirit of many preceeding provisions, at war with the principles of civil government, and for rapacity, despotism and injustice unparalled in the history of legislation. It is submitted that wherever this provision conflicts, as will be hereafter shown, with provisions re-enacted from the former constitution, or adopted from the Constitution of the United States, or designed and enacted for the security of private rights, as well as where it conflicts with the Constitution of the United States, the latter provisions must prevail.

There having been at the trial, no discussion of the question as applied to the evidence offered by defendants, I am somewhat at a loss to discover upon what particular facts the Court predicated its instruction, as the commissioners of school lands report the land as forfeited for "Non entry," which the constitution does not make a cause or occasion for forfeiture, and the Auditor does not certify it to be forfeited at all, but certifies certain isolated facts, which would seem to justify the conclusion that counsel for defendants, if not under the same misapprehension as the commissioner of school lands, were at least uncertain as to the ground upon which they would base the claim of forfeiture.

*The Forfeiture Provision Considered.*

This forfeiture provision seems to be almost universally misapprehended and the forfeiture misascribed. Out of the desire apparently of those who defend it, to find some cause for the confiscation and to make it a penalty for some delinquency of the owner, the alleged forfeiture is commonly said to be "*because*

the owner has *failed to have* his land *entered* on the land books," or briefly, "for omission," for "non-entry," and less often "*for failure* of the owner to *have* himself charged with taxes."

There is nothing in the constitution to justify such expressions. The supposed forfeiture is not because the land is not entered on the land books, or because of anything the owner has done or failed to do. Mark the language: "When for any five successive years since the year 1869 the owner of any tract of land containing one thousand acres or more *shall not have been charged* on such books with State tax on said land, then by operation hereof the land shall be forfeited," &c. It is "When * * he shall not have been charged," and not because he has *failed* to do anything, and not *because* the land is not *entered* on the land books.

There is a provision that "it shall be the duty of every owner of land *to have it entered upon the land books* of the county in which it or a part of it is situated, *and to cause himself to be charged with the taxes thereon and pay the same*," but what of it? That provision is not coupled in law or grammatical sense with any thing preceeding or following, and it might as well appear in a different article. No consequence or effect of any sort is, in terms, attached to a failure to perform that duty, *and penalties are not to be raised by inference*. No penalty is charged to attach to the owner of *less* than 1000 acres, upon whom the duty is laid equally with the owner of a thousand acres or more.

The provision for forfeiting the land "when the owner shall not have been charged" makes no reference to, and has no grammatical or other connection with, the provision prescribing the duty of the land owner, and is in no manner whatever dependent upon it, for meaning or legal effect or validity. Strike out the "duty" provision and it would not change or affect the meaning or force of a single other syllable in the Article. The forfeiture is as purely a causeless and arbitrary capture of property as was ever made by a pirate upon the high seas. When the pirate falls afoul of the merchantman, the latter is, by operation thereof forfeited to and vested in the pirate.

But stretch the language, if you please, and make of it a forfeiture *because of the default of the owner*, it is then a self-enforcing penal statute, prescribing a most monstrous penalty for what, in the harshest view of it, is not a transgression of any law of God or man. From this standpoint I am quite willing it should be considered.

Under this Article a forfeiture may accrue in spite of any thing in the power of the land owner to prevent it. He is charged with the duty of having his land entered and assessed, and of paying the taxes, but how is he to do it? The law does not provide. He is not the owner or custodian of the land books and has no right to make the stroke of a pen therein, nor does the law make him his own assessor.

He may request the clerk of the county court, who is charged with the duty of making out the land books and entering the land thereon, (Code chap. XXIX, sec. 8) and the clerk may neglect or refuse, for what may seem to him cause, or without cause, to enter the land. Must the owner resort to the State's courts to compel the State's agent and officer to perform his duty? The time within which to have the land entered and assessed may be nearly expired when refusal is made, and may expire before application can be made to the court, and the taxes charged. If the land owner prosecutes the clerk for neglect of this duty, the State gets the penalty and still gets the land. If the land isn't entered the owner can't be charged with taxes, and if taxes are not charged he can't pay them. The refusal or omission of the officer to put the land on the books as requested, or to charge the taxes after it is put on, would entail all the other omissions and the forfeiture.

The land owner may even "have it entered upon the land books," he may have exacted and received from the assessor and from the county court and other officers, who are vested with the power and duty to fix the valuation and charge the taxes, the assurance that at the proper time and in the proper manner, the taxes will be duly charged, *still the taxes may not be charged*, and whether it be through the inadvertance or fraud of the officers, the land is, "by operation of law," eternally swept away from him and given to another who may perhaps be the very one who has fraudulently brought about the forfeiture, No one who has had experience in those counties of this State where a cloud of county officers, tax title buyers, land grabbers and their attorneys subsist largely upon these and kindred land frauds, will say that these things cannot happen. Worse than these, if possible, do happen.

But this is not all. The owner may prevail over the clerks, the assessor and the county court, by *mandamus*, if need be, but they deal with county and district taxes, and it is only when the owner "shall not have been charged on such books with *State*

tax on such land," that forfeiture results; and with taxation for State purposes, the Legislature, and it alone, is charged and entrusted by the Constitution (Art. X). It certainly is not going too far to say that when the law undertakes to make it the duty of a man to "cause himself to be charged" with State taxes, it requires of him what he can perform by no power of his own or by any that he can invoke, and yet if he is not so charged, his land becomes "by operation of law" the property of the State or a bystander.

Besides other powers of taxation conferred upon the Legislature by the State Constitution it is provided (Art. X, 5) as follows:

> The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and the interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, *as well as the estimated expenses of such year.*

If for any reason the Legislature, which has the sole power, should not find it necessary to levy any state taxes, or should not do so, for the requisite period, the land owners could not be charged with state taxes and the titles to every foot of land in the state would be forfeited and every owner divested in spite of anything he could do; and the only ones to come out of the operation with any land would be the State or trespassers and those who had been claiming under color of title. Such failure of the Legislature for one year would be fatal to the man whose land for the four preceding years had not, for any reason, been charged.

This may be said to state an extreme case, and I grant it, but it is a possible one, and legislative deadlocks, invasions and insurrections, have, before now, brought about extreme cases; and

> "The Constitutional validity of a law is to be tested not by what has been done under it but by what may by its authority be done." *Ullman* v. *Baltimore*, 73 Md. 576, quoting *Stuart* v. *Palmer*, 74 N. Y. 183.

And what may be done under this Article XIII? *Cui bono*, and to what purpose are four lines devoted to the causeless confiscation, and two pages to the prodigal distribution of the land of the citizen?

If the position of defendants in error is tenable, and the pro-

vision upon which they rely is valid, it is within the range of probable occurance that by mere operation of law, without sentence, judgment or decree; without condemnation, trial or accusation; without summons, notice or opportunity to defend; without compensation or indemnification, and without compunction or remorse, the State may wrest from one person, her citizen, it may be, guiltless of any crime or offense, or any violation of law human or divine, remiss in no public or private obligation, property of untold value that is lawfully his own, and assume it to herself, or gratuitously bestow it upon another person, a stranger perhaps, an alien enemy (until office found), a foreign corporation without a soul, or a felon in his cell, to whom or to which neither the state nor the one divested owes any debt or duty, and who has no better claim to such land than arises from the voluntary payment of a few dollars of void taxes under a bogus deed from one who never had or claimed any title, and in the hope of acquiring another man's land for nothing. And this may be, though the owner has "had his land entered on the land book" and who and those under whom he claims, have paid taxes for near a century, as in the present case, and where the owner has paid every cent of tax on the land, if it happen in any way that the land is charged in the name of another, his grantor for instance, and not in the name of the *owner*. To this extent has it been contended. It is easily perceivable that in case of forfeiture, the chance of the State receiving anything is infinitesimal, when one considers Sec. 3 of said Article and understands the system of overlapping surveys and successive regrants of the same land, that prevails in the state. But, whether the land goes to the state or to a private person, the "forfeiture," is a direct legislative transfer from one person to another.

## PLAINTIFF'S LAND ENTERED ON LAND BOOKS.

The title to the land in question was in Robert E. Randall, trustee, from the time of his appointment as trustee by the court in 1866, until his successor Read was appointed in 1886.

All taxes charged and chargeable upon the land, up to and including the year 1883, had been paid by him (p. 30). That is undisputed and is shown by defendant's evidence as well as plaintiff 's. He had, then, discharged the duty of having the land entered on the land books and having it and himself "charged with the taxes thereon" and paying the same. He paid the taxes as long as they were charged, if, as defendants urge, none

were charged after 1883. If they had been charged, they would have been paid or the land would have been sold. If he stopped paying taxes after the *state authorities stopped charging them*, it does not seem remarkable. When he had his land entered for taxation, he did all he could do, all he was required to do, and all that was needful for him to do, to subject the land to taxation forever after, unless it should be sold to the state and never be redeemed. The owner is not required to have his land entered, &c., *toties quoties;* the law does not require it in terms or by just construction nor by any implication. No implication would be tolerated that might lead to a forfeiture. It was never contemplated that the land owner should, year by year, watch and see that the land is kept on the books, for ample provision is made by law for the officers of the state to attend to that, and when the owner has once given it in, they are required to look after it, and may reasonably be trusted by the owner and tax payer to do so, the direction to them being mandatory, and penalties provided for their failure.

The clerk of the county court makes up the land books from the land books of the previous year, and from other official records, reports and information, and has all the necessary data year after year, to keep them complete and accurate, and is required to correct errors and mistakes and enter and charge the land to the proper persons, "whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged or *otherwise*."

## PROVISIONS FOR ASSESSMENT, &c., OF LANDS.

Some of the provisions of law relating to the matter of charging land with taxes are found in the following sections of said chapter XXIX of the Code of W. Va.

SEC. 8. The land books for every county shall be hereafter made out complete by the clerk of the county court of such county. In making said land books in each year he shall be governed as far as is proper, by the copy of the land books last made out in his county used by the assessor or assessors therein in making his or their assessments for the year, and the entries made therein by him or them, and returned to him as required by this chapter. But he shall correct errors and mistakes which he may discover in any such land books as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes

thereon or otherwise. He shall also correct all errors and mistakes he may find in such land books as to the distance and bearing of any tract of land from the court house or in the local description thereof, and all clerical errors of every sort which he may find therein. * * *

SEC. 9. The clerk of the county court, in making out the land books, shall correct any and every mistake he may discover in the original land books, and if any taxes have been omitted for a former year, he shall enter the same, with lawful interest thereon, for collection.

SEC. 10. When the assessor shall ascertain that there is any land in his district which has not been entered in the land book, or after being so entered, has from any cause been omitted for a period of less than five years, he shall make an entry thereof, and of the name of the owner, in the copy of the land book in his possession; and if there be no assessment of the same, shall proceed to make such assessment, to the best of his judgment, by reference to the assessed value of contiguous land similarly situated, and shall certify to the clerk of the county court all the taxes which should have been charged or collected, with lawful interest thereon; and the clerk of the county court shall be governed thereby in making out the land book. Any assessor failing to make such entry and deliver such certificate shall forfeit twenty dollars. And if the clerk of the county court make any such discovery, he shall enter the same in the land books and inform the proper assessor thereof, who shall assess the same as aforesaid, and certify his assessment to the clerk; and the clerk shall thereupon charge said real estate with taxes as aforesaid.

SEC. 14. If the owner of any tract or lot of land has derived title thereto by several conveyances from the same person, or from different persons, such tract or lot shall be entered and charged with taxes on the land books as a whole, and not in different parcels.

SEC. 15. The clerk of every circuit and municipal court shall annually in the month of April, make out lists of all judgments and decrees for the partition or recovery of lands which have been rendered by their respective courts, and have not been before reported to the proper officer, stating in such list the date of the judgment or decree in each case, the land recovered and by whom, or the land which was divided, and between whom and in what parcels.

SEC. 16. The clerk of every county court shall annually, in the same month, make out a list of all lands, if any, lying in another county absolutely devised by wills recorded in his office and not before reported to the proper officers, stating in such list the date of the will in each case, when admitted to record, the names of the devisor and devisee and a description of the land devised.

SEC. 17. Every list mentioned in the two preceding sections shall be delivered or transmitted by mail by the officer making it, to the clerk of the county court of the proper county.

SEC. 18. The Secretary of State shall annually, in the month of April, make out and forward to the clerk of the county court of each county, an abstract of all the grants issued by the State for land lying in such county not previously reported for assessment.

SEC. 20. Any party interested may procure at his own cost, a certified copy or statement of any deed, judgment, decree or grant, and deliver the same to the clerk of the county court, and the clerk may examine original deeds or the records of his or any other county to ascertain to whom any parcel of land is properly chargeable, or its description or quantity.

SEC. 23. Real estate purchased for the State at a sale for taxes, shall not be thereafter entered in the land books, but the Auditor shall keep a register thereof. But when the real estate so purchased appears by the Auditor's certificate to have been redeemed, the same shall be replaced in the land bood in the name of the former owner, his or her heirs or his or her grantee, and the Auditor shall, in the month of April in each year, certify to the clerk of the county court a list of such lands in his county as have been so redeemed within the preceding year. When real estate is sold to an individual for taxes, the clerk shall note in the land book the number of acres sold, and to whom, but shall continue the land upon said book in the name of the former owner until the purchaser obtains a deed therefor.

SEC. 24. The land specified in the lists, copies, deeds, records, abstracts and statements mentioned in the fourteenth, fifteenth, sixteenth, eighteenth and twentieth sections of this chapter, shall be transferred in the land books to the persons who appear thereby to be the owners thereof.

SEC. 26. When the owner dies intestate, his undivided real estate may be listed to his heirs without designating any of them by name until they shall have given notice to the clerk of the county court of the division of the same, the names of the several heirs, and the parcels allotted to each; and each heir shall be liable for the whole tax assessed upon such land while it is so listed; * * * Where the owner has devised the lands or a free hold estate therein absolutely, the clerk shall charge such land to the devisee. If, under the will, the land is to be sold, it shall be charged to the decedent's estate, and the assets in the hands of the personal representative shall be liable for the taxes until a sale and conveyance thereof be made.

SEC. 39. The assessor shall begin annually, on the first day of April, and proceed without delay to ascertain all the persons and property, real and personal, on that day, subject to taxation in his district. The taxes for each year upon real and personal property, shall be paid by those who are the owners thereof on that day, whether it be assessed to them or to others.

Sec. 77.—The assessor shall deliver to the clerk of the county court the land book used by him in making his assessments, together with the statements and corrections made therein, or appended thereto, and said clerk shall make three fair copies of the land book, and when the same are completed he shall, with such assistance as may be necessary, compare each copy thereof with the land book of the preceeding year, and when necessary, shall examine the records of his office and such transcripts, abstracts or statements from other officers as may be therein or in the possession of the assessor. He shall point out to the assessor, whose duty it shall be to attend at the office of said clerk when required, such errors, if any, as in his opinion exist in any of the books, and correct the same; but if the assessor does not concur as to the propriety of such correction, the matter shall be submitted to the prosecuting attorney for the county, and they shall conform to his decision.

Other sections provide for the verification of the land books and assessmeuts by the oaths and certificates of the clerk and assessor, and penalties for their failure to perform their duties.

Nothing is left to the land owner, nothing required of him, to

keep the land charged with taxes. By this statute, existing since 1863, every provision is made that ingenuity can suggest, to enable the officers who are charged with the entering of the land and the charging of taxes, to subject all lands and all owners thereof, to the payment of taxes. Every public record past and present, is put before them; every change in the record titled, by deed, devise, descent, decree or otherwise is certified to them. If there is no change in title, or until notice of change, the land must continue unchanged upon the land books, charged with taxes as formerly; if there is a change, the clerk and assessor are notified and the land entered and charged accordingly.

The Clerk of the County Court is the County Recorder—the Register of Deeds of his County. Every record affecting the title to land in his county is made by him, and he is required by the law (secs. 20-77) to examine the records and be guided by them in making up the land books and charging the taxes. The assessor is required (sec. 39) *each* year to ascertain *all persons* and property, *real* and personal, subject to taxation and has all possible facilities for doing so. The Legislature makes the State levy, the County Court the county levy, the assessors and clerk of the County Court make up the land books, enter the lands, extend the valuation and charge the taxes. The land owner need not and cannot meddle with the matters, and could not prevent them from charging his lands if he should desire. He ought not to suffer loss of his land for the acts or omission of these officers—he may not have voted for them.

An initial entry, etc., of the land, required by the Constitution, is all that was contemplated, or is requisite; for land once entered upon the land books need never thereafter fail to remain thereon and be charged with taxes against the proper person, unless the same be sold to the state, and in case of sale for taxes the owner has an assessment and a tax sale to deal with, with the reports and notices provided by law for his protection. Having once had his land entered on the land books, the owner and those claiming under him have every right and reason to suppose, as he has discharged his duty, that the land will be safe from everything but tax sale, and it would seem that a tract of several thousand acres could not get off the books and not be missed,—that it could not be dropped except by fraud or collusion of some officer with something to gain by the forfeiture to result. And when we see further (Sec. 10) that it is made the duty of the clerk and the assessor, severally, upon discovering

that any land has been omitted for less than five years, to enter the same on the land books and charge the taxes, it would seem to furnish further assurance that at least a half million acre tract could not escape, for five years, officers so enquiring and vigilant as assessing and revenue officers generally are, unless they or their friends had something to gain of more value to them than the "life blood" of the state. If the officers of the state would but do their appointed duty and serve the state with half the zeal they suck their share of the state's "life blood" and aid in the grabbing of lands that only through their negligence or fraud could ever fail to be charged with taxes, such thing as forfeited land would be unknown in the State of West Virginia.

The most casual examination of the constitution and the law above given for the assessment of taxes, shows clearly by the terms of the law and the necessary legal result of it, that the forfeiture is not because of any act or omission of the land owner, but may result in spite of him, and can result only "when * *" (by the negligence or fraud of the officers of the law) "the owner of any tract of land ** shall not have been charged with state taxes thereon." Forfeitures are odious in law and will not be enforced or sustained if it can be avoided. What is there about the forfeitures claimed under the West Virginia law that makes them sacred and holy things, or constitutes that "due process of law" that is the protection of the American citizen and his property, or takes them out of its operation? If the State wants the land of the citizen, why should she not proceed under the usual forms of judicial proceedings and process of law to acquire it? If she wants revenue that is exactable from it, why should she not, in the manner provided by law, levy a tax upon it and its owner and enforce payment by a sale, if need be, that might still leave the owner something? If a man covet his neighbor's land, why should he not treat with him for it, or even declare it to be his own and enter and hold it adversely? If counsel for defendants shall take me to task for suggesting the possibility, that the officers of the State or their friends may have some interest in letting large tracts of land escape assessment, or incur forfeiture, whereby such officers or those whom they privately serve, may gratuitously acquire the lands of others, and receive the premium upon their fraud, offered by this forfeiture provision, I hope they will not fail to indict, in the same bill, Judge Cooley, who says:

"Public officers may connive with rogues, to rob the citizen of his property; witnesses may testify, or officers certify falsely, and records be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown and deprive the party wronged of all remedy, has no justification in the principles of natural justice, or of constitutional law." Const. Lim., 363.

## OF THE NATURE OF FOROEITURE.

### PLAINTIFF'S TITLE NON-FORFEITABLE.

*Ninth Specification of Error.*

The error logically entitled to first consideration is the one alleged as "NINTH" in the Specification of Errors.

If forfeitures are odious, and the rule of strict construction applies, that strictness cannot be more appropriately applied than to the very word itself, and to the conditions under which a forfeiture, properly so called, may, and the conditions under which it may not occur; and a moment's consideration shows that in spite of a very general looseness of expression to be found both in statutes and decisions of courts, forfeiture, as between our modern governments and the citizen, has very narrow standing room. Under the old feudal system of land tenures in England, where estates were held of the king and the nobles, subject to various conditions, forfeiture of the estate of the feudatory, for failure to respond to the demands and duties incident to his tenure, or to comply with any of its conditions, was the natural and proper determination of the estate. The estate was *forfait*—made over—to the owner of the fee; but there was, and in the nature of the case could be, no forfeiture of the fee itself, which was a paramount title; and even in the case of forfeiture, the estate of the feudatory was not terminated by the forfeiture; there had to be an entry by the lord paramount or a judgment by inquest of office.

Of forfeiture of land, Sir William Blackstone says: "Forfeiture is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments, whereby he loses all his interest therein and they go to the party injured as a recompense for the wrong, which either he alone, or the public together with himself hath sustained.

"Lands, tenements and hereditaments may be forfeited in various degrees and by various means: 1, By crimes and misdemeanors; 2, By alienation contrary to law; 3, By non-presenta-

tion to a benifice, whence the forfeiture is denominated a lapse; 4, By simony; 5, By non-performance of a condition; 6, By waste; 7, By breach of copyhold custom; 8, By bankruptcy.

"The offenses which induce a forfeiture to the crown are principally the following six: 1, Treason; 2, Felony; 3, Misprison of treason; 4, *Praemunire;* 5, Drawing a weapon on a judge or striking anyone in the presence of the King's principal courts of justice; 6, Popish recusancy or non-observance of certain laws enacted in restraint of papists." Bl. Com., 267.

These were the causes of forfeiture in Blackstone's time, but the most of these are unknown to modern law, and substantially the only ones that survived until the adoption of the American Constitution, were forfeiture for crime and for non-performance of conditions; and of the former only three are known to our law, and of these only one, treason, was permitted by the Constitution of the United States to be a cause of forfeiture, and that to a limited extent only. To treason some of the States added felony, as a permissible cause of forfeiture, but most, if not all of these, like the United States, have abolished forfeiture of land as a consequence of crime; and the forfeiture or confiscation of personalty engaged in the violation of law, is because of the sin of the offending property as much as of the owner, after the ancient laws of *deodands.*

Blackstone traces the origin of forfeiture for crimes and misdemeanors to Scandinavian, or perhaps more remote, sources; but whatever its origin, it was, like all other forfeitures, an essential part of the feudal system of land tenures, all crimes being a breach of duty to the king, the ultimate lord paramount of every fief and under whom all lands were held. With the abolition of feudal tenures and our emergence from the Draconism of the dark ages, forfeiture of land, except for conditions broken or upon conviction and sentence for high crimes, is not, and never has been, any part of the law of the land in this country; and this latter kind of forfeiture, where it occurs, is, in modern jurisprudence, more properly a confiscation.

Mr. Washburn, in his work on Real Property, (Vol. III, p. 47) disposes of the question of forfeiture very briefly and in this wise:

"The English doctrine of forfeiture of lands to the State, for crime, or corruption of blood, is generally, if not universally, done away with in this country, and will therefore be no further noticed in this work."

Forfeiture for crimes was retained but a short time in Virginia, it being abolished in 1789, 13 Henning's Statutes at Large, Chap, XXX, sec. 13, as follows:

"Whenever any person shall happen to be attained, convicted or outlawed of any treason, murder or felony whatsoever, there shall in no case be a forfeiture to the Commonwealth of dower or of lands, slaves or personal estate, but the same shall descend and pass in like manner as is by law directed in case of persons dying intestate; nor shall any attainder work a corruption of blood, any law or usage to the contrary in any wise notwithstanding." This has remained the law of Virginia ever since.

Forfeitures had previously been much restricted even in case of treason, dower rights being saved.

There has been in the several Codes of Virginia and of West Virginia from 1819, to the present time, the provision:

"No suicide or attainder of felony shall work corruption of blood or forfeiture of estate."

In 1864 West Virginia, by act of the Legislature, which exceeded constitutional authority, defined the punishment of treason as follows:

"Whoever is guilty of treason against the State shall be punished with death or, at the discretion of the jury, by confinement in the penitentiary not less than three nor more than ten years, and by the confiscation of his estate." (Acts 1864, p. 783). The term *confiscation* is appropriately used.

The present Constitution (1872) provided, however, Art. III, 18, that, "No conviction shall work corruption of blood or forfeiture of estate."

So far then as Virginia and West Virginia are concerned, the above quoted statement of Mr. Washburn is well warranted, for with the exception of the Act of 1864, above mentioned, forfeiture or confiscation of real property, for criminal offense, has been unknown since the year 1789. The "forfeiture," then, with which we have to deal, unless it be for breach of condition, would seem to be wholly unique, both in land law and criminal law.

*Plaintiff's Grant Unconditional.*

Lands in the United States, whether derived from the United States, or from a State, are in general, held in fee simple, with no condition whatever upon failure or breach of which the estate may be forfeited. There can be no forfeiture of an uncon-

ditional estate, and such is the title granted by Virginia to Robert Morris. (p. 12).

It may be argued that there is a condition implied in every grant by the State, that the land shall be held upon the condition that the holder pay the taxes thereon, or that such a condition is imposed by law; but no one, it is thought, will contend that there is an implied condition, that the land shall be forfeited "when ** the owner *shall not have been charged with taxes*" on it, or even that he shall have it charged with taxes. The suggestion of any condition is, however, without support. It is easy for the State to embody in her grants any condition that may be desired, and it is equally easy for the State, by express and unequivocal enactment, to declare that *thereafter* all grants shall be upon such condition as may be expressed in the law. Something like this is found in the case of charters and franchises; but when the law does not so provide, there can be no ground or warrant for *imagining* a condition, where the language of the grant is inconsistent with the idea of a condition. The expression of conditions excludes those not expressed, and in the grant to Morris (p. 12) there is a stated provision concerning certain reserved land, and no other qualification whatever.

But the obligation of the member of society to pay taxes, or to discharge any other duty of citizenship, is wholly independent of the nature of his tenure, or the origin of his title to his property; for the obligation is the same in Kansas where title to land is not derived from the State, as in Virginia where it is; and property brought from without the state is subject to taxation equally with property derived from the State. The payment of taxes is a duty owed the State for the maintainance of the government, and the protection given by the laws, it is not a condition of land tenures; and though land, like other property, is liable for the payment of taxes, so it is liable for the private debts of the owner; but in neither case does the liability make the owner's estate a conditional one.

*Gaines* v. *Buford*, 1 Dana 488-90.

*Arrowsmith* v. *Burlingim*, 4 McLean 494.

*Griffin* v. *Mixon*, 38 Miss. 448.

In Giffin *vs.* Mixon, Judge Harris says:

"Mr. Kent, in his Commentaries, vol. 4 p. 137 (9th ed.) says: 'The doctrine of estates upon condition, in law, is of feudal extraction, and resulted from the obligation arising out of the feudal relation. The rents and ser-

vices of the feudatory were considered as conditions annexed to his fief, and strictly construed; if the vassal was in default by non-payment of rent or non-performance of any feudal duty or service, the lord might resume the fief, and the rents and services were implied conditions inseparable from the estate.'

"It will be seen, therefore, that a doctrine originating in barbarity and plunder, * * * a doctrine founded in subjection of the citizen to almost abso'ute servitude by special contract; a doctrine wholly opposed to the principles of personal freedom as well as the security of private property, can have no application, either in fact or theory, to a government like ours. Property is held by no such tenure, nor is it held of any superior.

"To hold now * * * that a citizen who purchases a tract of land by a written contract or patent * * * even of the State of Mississippi itself, conveying an absolute title for a full consideration paid, without any condition expressed upon its face, holds that land upon * * * condition not expressed in the deed or grant itself, is a doctrine belonging to the past ages of legal fictions and the divine right of kings, and not to this day of written constitutions declaring the sovereignty of the people and the servitude of governments. Indeed, under the doctrine of feudal tenures, no such arbitrary power as that set up for the State (by *legislation* alone, to appropriate to itself the property of the citizen for non-payment of tax) existed. Chancellor Kent says on this subject, Vol. 4, p. 138: 'The remedy for breach of the condition was confined to the resumption of the estate, by the donor and his heirs, and that *resumption* was required by the *just interpretation* of the law to be by *'judicial process.'*"

There is no lack of *feuds* in West Virginia, where plaintiffs' land is, but there are no feudal tenures or titles.

## FORFEITURE NOT "DUE PROCESS OF LAW."

### *Sixth Specification of Error.*

The error that includes all the others is the instruction of the court that the title claimed by plaintiff was, under the provisions of the Constitution of West Virginia, forfeited to and vested in the State; and the objection that those forfeiture provisions are wanting in due process of law, embraces the other objections urged against them; for the expression, "due process of law" is as comprehensive in its scope as the cardinal virtues of ethical philosophy, including everything that is right and just, excluding everything wrong and evil.

The provisions of the Federal and State Constitutions referred to in said specification of errors are as follows:

## FROM THE CONSTITUTION OF THE UNITED STATES.

ART. 1. SEC. X., 1. No state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts.

AMENDMENTS.

ART. VIII. Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted.

ART. XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

From the Constitution of West Virginia:

ART. I., 1. The Constitution of the United States of America and the laws and treaties made in pursuance thereof shall be the supreme law of the land.

3. The provisions of the Constitution of the United States and of this State are operative alike in a period of war as in a time of peace, and any departure therefrom or violation thereof, under the plea of necessity or any other plea, is subversive of good government and tends to anarchy and despotism.

ART. III, 4. No bill of attainder, *ex post facto* law, or law impairing the obligation of a contract shall be passed.

5. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense. * * *

9. Private property shall not be taken or damaged for public use, without just compensation. * * *

10. No person shall be deprived of his life, liberty or property without due proces of law and the judgment of his peers.

20. Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and by a frequent recurrence to fundamental principles.

ART. V, 1. The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.

Few courts have had occasion, be it said to the credit of our country, to pass judgment upon enactments like the one under consideration; but the principles by which its validity must be tested, have been frequently expounded by the highest courts and the ablest jurists of England and America. From some of the reported cases, from many states and many courts, I give extracts at some length, and invite the Court to an examination of the cases cited.

It is not to be forgotten at any time, that the provision of the State Constitution purports and undertakes by itself, "by operation" of itself, and necessarily without the aid or intervention of any other agency or power, to transfer the title to a tract of land

from one persen to another, *whenever* for a stated period of time, neither the beginning or the ending of which is determined, the owner "*shall not have been charged* on the land books with state tax on the land."

## "DUE PROCESS OF LAW" DEFINED.

Mr. Webster, in the Dartmouth College case, 4 Wheaton,578, gave to the words the "law of the land," which are held to mean the same as "due process of law," (*Jelly* v. *Dills*, 27 W. Va. 274), the following definition:

"By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." And he continues:

"Everything which may pass under the form of an enactment, is not therefore to be considered as the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, *and acts directly transferring one man's estate to another*, legislative judgments, decrees and *forfeitures*, in all possible forms would be 'the law of the land.' Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. The administration of justice would be an empty form, an idle ceremony, and Judges would sit to execute legislative judgments and decrees, not to declare the law and admisinter the justice of the country."

Chancellor Kent says: "The better and larger definition of due process of law, is, that it means law in its regular course of administration through courts of justice."

In *Dorman* v. *The State*, 34 Ala., 216, (1859) a case involving the constitutionality of an act of the Legislature of Alabama, upon the ground that it took property, or deprived a citizen of property, without due process of law, the Court in defining due process of law, used the following language:

"The expressions, 'the law of the land,'—'due process of law,'—and 'due course of law'—as found respectively in the English charters, and the various State constitutions in the United States, are substantially identical,and have always been held to mean a judicial proceeding, regularly conducted in a Court of Justice, as contradistinguished from statutory enactment. Any other construction would deprive the guaranty of all its force, and put the rights it is designed to protect, at the mercy of the Legislature. If life, liberty and property could be taken away, by direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the Legislature, and the provision would be a mere nullity. Thus construed, the Constitution would read, 'no person shall be deprived of his life, liberty or property, unless the Legislature pass a law to do so;' a prop-

osition so plain in reason and principle, hardly needs to be buttressed by authority. Chancellor Kent says: That 'the better and larger definition of due process of law, is, that it means law in its regular course of administration through Courts of Justice.' 2 Kent. 13. Chief-Justice Ruffin states the construction of these words with marked emphasis and directness—'the terms, 'law of the land' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at an end. * * * The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before a judicial trobunal, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually laws of the land for those purposes.'—*Hoke* v. *Henderson*, 4 Dev. 15.

"Without now indorsing that part of the opinion just quoted which implies that the trial *must* be 'according to the course, mode and usages of the common law,' it may be laid down that an act of the Legislature is not and nothing less than a regular judicial trial is, 'due process of law,' within the meaning of this clause of the Constitution."

*Calhoun* v. *Fletcher*, 63 Ala. 574, (1879) was a case arising upon a municipal ordinance with reference to the sale of land for taxes, which provided for the issuing of a certificate to the purchaser, which certificate should operate as a conveyance, if the property was not redeemed within a prescribed time.

The Court quotes with approval the language used in the above case, and further says:

"If the property is not redeemed within the time prescribed by the charter, the certificate shall operate as a deed of conveyance. * * * To summarise: All the various and well-guarded processes, by which taxes are levied and assessed, the fact that the tax payer is in default, the unsuccessful inquiry and search for personal property, the due and the legal advertisement and sale; all these disputable facts are proved by the collector's certificate. The purchaser is then put in possession by force (the certificate authorizes the force, and legalizes the purchaser's possession for two years, unless the property is sooner redeemed); and if not redeemed within the two years, the certificate operates as a deed of conveyance, and the title as well as the seizin of the tax-payer, is gone forever, by mere legislative enactment, without the semblance of judicial proceedings.

In Cooley's Const. Lim. 363, it is said: 'Forfeiture of rights and property cannot be adjudged by legislative act; and confiscations without a judicial hearing, after due notice, would be void, as not being process of law.' And on pages 368-9, the same standard author says: 'In judicial investigations, the law of the land requires an opportunity for a trial, if only one party is suffered to produce his proofs.' The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues, to rob the citizen of his property; witnesses may testify, or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles

of natural justice, or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.

And in Cooley on Taxation, 377, it is said: "It would be manifest and most gross injustice to make lapse of time alone, extinguish the owners title. * * * * And it seems to us very clear that under such circumstances, it is not competent to limit a period, at the expiration of which, the tax title shall become a perfect title, and not open to controversy or dispute.' Blackwell on Tax-Titles, 449, in margin. In Burroughs on Taxation, 336, it is said: 'The doctrine is settled, that it is not in the power of the legislature, by mere legislative declaration, to divest the title of the owner.' In *Denny* v. *Mattoon*, 2 Allen, 361, 378, the Court employs the following language: 'If for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law, the arbitrary will of the Legislature, and thereby controlling the action of the tribunal before which the suits are pending; no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary.' See also *Richards* v. *Rate*, 68 Penn. St. 218; *State of Maine* v. *Doherty*, 60 Maine, 504; *Conway* v. *Cable*, 37 Ill. 82.

These principles and authorities are decisive of the question we are considering. The ordinance is but an act of legislation, and possesses none of the properties of a judicial proceeding. It is violative of the Constitution, and therefore void, to the extent above pointed out; because it deprives the tax-payer of his property, without due course of law."

The court, in the above case, and Mr. Cooley, think it a "*manifest and most gross injustice* to make *lapse of time alone*, extinguish the owner's title." But that is what defendants in error contend for. One day the owner's title is complete and perfect, the next, by mere effluxion of time, it is out of him and in another, without the act, or knowledge perhaps, of either or of a living thing on earth. And to the Court and Mr. Cooley, it is very clear that "it is not competent" to do that sort of thing.

In *Pierce* v. *Kittzmiller*, 19 W. Va. 564, there is a full discussion of what is meant by this constitutional restriction.

*Chauvin* v. *Valiton*, 20 Pacific Reporter, 658, decided in the Supreme Court of Montana, on February 12th, 1889, is an analogous case. The syllabus reads:

Rev. St. Mont. section 816, making license fees a first lien on all property held or used in any of the trades, occupations, or professions for which a license is required, and making it the duty of the County Treasurer, on failure or refusal of any person to procure a license when required, 'to seize any of the property upon which a lien is hereby created, or any other property belonging to such person, * * * and sell the same in the manner

provided for sheriffs on execution to satisfy said license and costs,' but making no provision for giving notice to the owner of such property of the seizure and sale thereof, is unconstitutional, as depriving persons of property without due process of law.

McConnell, C. J., wrote a very clear opinion citing a great many authorities. He said:

"There is no provision for the owner to be heard; no notice is to be given him; he has no day in court." * * * "We might multiply authorities on this subject indefinitely, but we think the foregoing are sufficient to show the current of authority upon this subject; we hold that the doctrine laid down in the case of *Overing* v. *Foote* (65 N. Y. 269) towit: 'That some sort of notice of the proceeding to be had against his property, and that in some form he may be heard if wrong is apprehended before any portion of his estate is seized for the support of the government,' is the constitutional right of every citizen, and if he is not given this opportunity, and his property is taken from him, it is done without due process of law, and is an infraction of the foregoing provisions of the Federal Constitution.

* * * Such a law is against reason. It violates every sense of justice and of right. Such procedure occurring between private citizens would be regarded as gross fraud, if not theft, and, when done by the government, it cannot be characterized by a milder term than 'tyranny.'"

The act was held unconstitutional and void.

And yet the act which evokes such strong language, provided that the property should be sold for the benefit of the public and only to enforce the tax. It was not *confiscated* and given to some one who happened to be in the same business. Only the tax was taken, the surplus reverted to the owner. What would the court have said of the West Virginia forfeiture laws?

In *Wicks* v. *Monihan* (Court of Appeals of New York, 1891) 29 N. E. Rep. 139, the syllabus reads as follows:

The constitution and by-laws of the Knights of Labor, providing that on suspension of a local assembly, its property shall be forfeited, and vest in the secretary of the general assembly are void, in that they seek to confiscate, without judicial process, property which is not derived from the general assembly, but is held and owned by the local assembly absolutely. 8 N. Y. Supp. 121, affirmed. *Austin* v. *Searling*, 16 N. Y. 112, followed.

In the opinion, Follett, C. J., says:

To hold that the general assembly can by a decree divest the title to property, and vest it in itself, is giving to it a power which is forbidden to be exercised by Congress, or by the Legislature of any State. Bills confiscating the property of citizens, or of associations, without judicial process, are forbidden by the Constitution, and no person, corporation, or association authorized to acquire and hold property can be divested of it by the fiat of any organization, nor in any way without its consent, or by due process of law.

*Baker* v. *Kelley*, 11th Minn. 480, was an action of ejectment, and the defense a tax title. Section 1, of the act under which the title was claimed, provided that all lands theretofore sold, for taxes of the year 1859, and all previous years, which had been purchased, and were held by the City or County, or were forfeited to the State, or where the certificate of tax sales of any such lands, were held by any City or County of the State, and wherever there was any delinquent tax due in any City or County of the State, for such time, should be redeemable by the owner or owners, upon certain terms.

Section 2, of said act, is as follows: "That if any such tract or parcel of land shall remain unredeemed, or such delinquent taxes shall remain unpaid, on said 1st day of November, 1862, such lands so unredeemed, and upon which such delinquent taxes remain in whole or in part, unpaid, shall, at said last named date, become forfeited to the State."

Said Section further provides for the sale of such lands by the County Auditor at a certain time, and place, after notice published for three weeks in various newspapers.

The tax title claimed by defendants, was derived under or through the sale so made. The Court in holding the tax title void, as taking property without due process of law, uses the following language:

'Due process of law,' without which the Constitution declares no person shall be deprived of life, liberty or property, is not merely an act of the Legislature. Chancellor Kent says, 2 Com. (13) 'the better and larger definition of due process of law, is that it means law in its regular course of administration through the courts of justice,' and this is now the well-settled meaning of this clause of our Constitution. Sedgwick on Const. Law, 534; *Taylor* v. *Proctor*, 4 Hill, 140; *Hoke* v. *Henderson*, 3 Dev. 12. In *Wynehamer* v. *The People*, Comstock, J., says: "I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law. No member of the State shall be disfranchised or deprived of any of the rights or privileges secured to citizens thereof, unless by the law of the land, or the judgment of his peers. No person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation (the language of our own Constitution). No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested that 'the law of the land,' or 'due process of law,' may mean the very act of the Legislature which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights unless the Legislature shall pass a law to effect the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitution-

al phrases is, that when rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but when they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the Legislature, but in a due administration of the law itself—before the judicial tribunals of the State. The cause or occasion for depriving a citizen of his supposed rights, must be found in the law as it is, or at least it cannot be *created* by a legislative act, which aims at their destruction. Seldon, J., in the same case says: 'To give this clause (of the Constitution above referred to), therefore, any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty or property, except as the consequence of some judicial proceedings appropriately and legally conducted. It follows that a law, which by its own inherent force, extinguishes rights of property, or compels their extinction without any legal proceedings, whatever, comes directly in conflict with the Constitution.'

That the plaintiff was the owner of the land, and authorized to prosecute and defend in the courts, his rights thereto, is admitted. That he has been deprived of either his property or legal rights, by that due process of law which 'proceeds upon inquiry, and renders judgment after trial' cannot be pretended. If the statute should be sustained, it would effect this; for a person is deprived of his property and legal rights, when he is forbidden to test or question the validity of the title of an adverse claimant. * * *

It will be observed that our Constitution guards property with the same care that it does life and liberty. If the plaintiff can be deprived of his property for the act or omission complained of, so could he of his life or liberty. Thus far, no reference has been made to the position that the Legislature, by Section 2, of said act, divested the plaintiff of his title to the property, and declared it forfeited to the State; and the views which have been above expressed, and authorities cited, so fully cover this point, that a mere reference to it now, is only necessary. Few questions are better settled, than that the Legislature cannot thus deprive a person of his property rights. If the Legislature by this section attempted to do more, than confer on the State the power to take such further steps as were necessary in the collection of the delinquent taxes or in the perfection of tax titles, then it overstepped the limits which the Constitution has fixed to its authority.

The Article XIII under consideration "*by its own inherent force* extinguishes rights of property, *without any legal proceedings whatever*," or attempts to do so, and "comes directly in conflict with the Constitution" of the United States. The property rights are extinguished—destroyed, by the Article if at all, for the idea of any judicial proceedings for that purpose is completely negatived by the words "by operation hereof;" and as in the above case, the proceedings provided in section 4 of the Article are not to *adjudge* a forfeiture and divest the title, but to sell the land the title to which *has already been divested* "by operation" of section 6.

The Minnesota court holds with the New York court that, "to say that 'due process of law' may mean the very act of the legislature which deprives the citizen of his rights, privileges or property, leads to a *simple absurdity*."

No other process is resorted to or provided in the present case than "*the very act of legislation that deprives the citizen of his property*," and defendants in error contend that none is needed.

*Taylor* v. *Porter*, 4 Hill, 145-7 (N. Y.) was a case that arose upon a statute of New York authorizing a private road to be laid out over the lands of another, and in declaring the act to be void as taking property without "due process of law," Bronson, J., used the following language:

> The words 'law of the land, do not mean a statute passed for the purpose of working the wrong, that construction would render the restriction absolutely nugatory and turn this part of the Constitution into nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived any of rights or privileges unless you pass a statute for that purpose;' or in other words, 'you shall not do wrong unless you choose to do it. * * *
>
> Lord Coke, in his commentaries upon this statute [Magna Charta] says that these words, 'by the law of the land,' mean 'by due course and process of law,' which he afterwards explains to be 'by indictment or presentment of good and lawful men where such deeds be done in due manner or by writ original of the common law.' * * * The meaning of this section (of the N. Y. constitution) then seems to be that no member of this State shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges or that some one else has a superior title to the land he possesses, before either of them can be taken from him. It cannot be done by *mere legislation*." The court further defined "due process of law" in the provision "no person shall be deprived," &c., to mean "not less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property," and says that "the same measure of protection against legislative encroachment is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the Legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law.

The court emphasizes the fact that a person cannot be lawfully deprived of his property by "mere legislation." It is not done otherwise in the present case, if done at all, than "by mere legislation"—"by operation hereof."

In *Barron* v. *Burns*, 39 Fed. 895, the court in commenting upon the provision in the charter of the City of St. Louis, Mo., attempting to make a tax deed conclusive evidence of nearly everything essential to its validity, says:

> It is to be conceded that the provisions of this charter respecting the validity of such deeds are very sweeping. And while the courts should treat with great respect the enactments of the legislative department of government, yet the courts, which stand as the last resort of the citizen and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the Legislature cannot do. It cannot take the citizens private property, even for public use, without due process of law. * * * Due process of law is not any process which legislative power may devise. As said by Mr. Justice Curtis in *Murray's Lessee vs. Improvement Co.*, 18 How. 276. 'The article [of the Constitution] is a restraint on the Legislature as well as on the executive and judicial powers of the goverment, and cannot be so construed as to leave Congress [the Legislature] free to make any process, 'due process,' by its mere will.

Cooley's Constitutional Limitations:

> Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

What "settled maxims" of law permit and sanction a direct legislative transfer of this plaintiff's property from him to another against his will and without fault or offense on his part, and without notice or previous enquiry? Under what "safeguard for the protection of individual rights" does the state of West Virginia, by this forfeiture law, divest the land owner of his property?

*Saxton* v. *Mitchell*, 78 Pa. St. 479:

A decedent left by his will the use of 20 acres of land to a religious society for camp meeting purposes. An act of Legislature directed a sale of the land and the investment of the proceeds in a more suitable camp meeting grounds. Held, that the society had the use only and not the fee, and that the Act which sought to authorize the sale of the *land*, was unconstitutional as attempting to transfer the property of one to another. It was wanting in due process of law.

*Dale* v. *Metcalf*, 9 Pa. St. 108:

An act validating sale by sheriffs made after return day of writ, was held to be unconstitutional, for like reason.

*Lavin* v. *The Emigrant Industrial Savings Bank*, 18 Blatchf., 1, discusses ably and at length "Due process of law" under the Fourteenth Amendment. This is a case wherein an Act of Legislature provided for administration upon the estate of a person absent for three years and supposed to be dead, was held to be void, the person being in fact alive. Administrator had collected money of plaintiff from defendant. Held, that plaintiff was deprived of property by the state within the meaning of the Fourteenth Amendment, when he was deprived by decision of Surrogate under Act of Legislature of the state. Held, that the prohibition extends to acts of the State through all its departments, legislative, executive and judicial.

*Irvine's Appeal*, 16 Pa. St. 263:

This arose upon an Act authorizing the sale of property of testator contrary to provision in will, and against the wish of certain heirs, and the Act was held to be void.

Judge Coulter declares the provision for "due process of law" in the Federal and State Constitutions to be an affirmation of the Doctrine of Magna Charta, and says:

"The whole clauses in our Constitutions were established for the protection of our personal safety and private property. These clauses address themselves to the common sense of the people and ought not to be filed away by legal subtleties. They have their foundation in natural justice and without their pervading efficacy other rights would be useless."

*Palairets' Appeal*, 67 Pa. St. 479.

In this case an act of the Legislature of Pennsylvania providing for the extinguishment of irredeemable ground rents, upon full compensation therefor to be ascertained and paid, was held to be unconstitutional as violating the guarranty of the "due process of law."

Judge Sharswood for the court says, in part:

"Retrospective legislation is certainly not in itself unconstitutional, unless so far as it has an effect prohibited by the fundamental law. If, however, an Act of Assembly, whether general or special, public or private, operates retroactively, to take what is, by existing law, the property of one man, and, without his consent, transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Const., Art. IX., sect. 9, which declares that no man "can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." If this is true of a person accused of crime, to whom literally the words are applied, *a fortiori* it is so as to one against whom no accusation i

made. By the "law of the land," is meant, not that arbitrary edict of any body of men—not an Act of Assembly, though it may have all the outward form of a law—but due process of law, by which either what one alleges to be his property is adjudged not to be his, or it is forfeited upon conviction by his peers of some crime, for which by law it was subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula of words, without life or force. For what more can the citizen suffer than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? It will not have escaped notice that in the clause of the Constitution referred to, property is put in the same category with liberty and life, and if an Act of Assembly can deprive of a man his property, without a trial and judgment for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury. It is true that there are other more special declarations which give additional securities to liberty and life, but by classing all three together in this provision of the fundamental law, the people have declared their equal inviolability. There are also other special provisions as to security of property—adapted to the dangers with which in a democratic form of representative government it is more especially threatened. But neither those clauses which relate to life and liberty, nor those which regard property, weaken the power of this grand primary inhibition, which the sturdy barons of England, arms in hand, wrested from their sovereign at Runnymede, *Nulus liber homo capiatur vel imprisonetur aut dssicisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum vel per legem terrae.* This is still the corner stone of our liberties. It becomes us to watch it with the greatest vigilence—not to suffer it to be undermined on any pretext, however specious."

In *Bank of State* v. *Cooper*, 2 Yerg. 599, (24 Am. Dec. 523) the court in discussing "due process" says:

"If the construction here contended for be not the true one, it seems to me that an edict in the form of a legislative enactment, taking the property of A and giving it to B, might be regarded as a "law of the land", and not forbidden by the Constitution; but such a proposition is too absurd to find a single advocate. This provision was introduced to secure the citizens against the abuse of power by the Government. Of what benefit is it, if it imposes no restraint upon legislation? Was there not as just ground to apprehend danger from the legislature as from any other quarters? Legislation is always exercised by the majority. Majorities have nothing to fear for the power is in their hands. They need no written constitution defining and circumscribing the powers of the government. Constitutions are only

intended to secure the rights of the minority. They are in danger. The power is against them and the selfish passions often lead us to forget the right."

*Fisher* v. *McGirr et al.*,
*Commonwealth* v. *Albro*,
*Herrick* v. *Smith*. } 1 Gray, 1.

Fisher sued McGirr, a constable, and others, in tort, for entering his house and seizing certain spirituous liquors. The taking was admitted, but defendants sought to justify the same by a warrant for such seizure, issued by a justice of the peace, under a statute which made the keeping of such liquor, under given circumstances, illegal, provided for their seizure and destruction, after certain proceedings before the justice of the peace, and the further imposition of a fine upon the person so keeping such liquor.

Albro and Herrick were severally convicted in the lower court of unlawfully keeping such liquor. Albro appealed and Herrick sued out a writ of *habeas corpus*.

These causes were heard together and all turned upon the constitutionality of the statute, which was defended by Rufus Choate, Attorney-General, and others, and the court, composed of such judges as Shaw, Bigelow, Metcalf, Thomas and others, unanimously held the statute to be unconstitutional and void.

Fisher was permitted to recover damages, and the other parties were discharged from custody.

The act in question provided for the issuing of warrants for search and seizure upon affidavit of three persons; the owner of the goods was required to be summoned forthwith "if known to the constable," and if unknown, notice of the seizure was to be published; and judgment was to be given by the justice, condemning the goods, declaring them forfeited and ordering them to be destroyed.

The act was held to be void upon several grounds, among them being Art. 12 of the Declaration of Rights, which declares that "No subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him; * * * and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of life, liberty or estate, but by the judgment of his peers or the law of the land."

"These," says Chief Justice Shaw, in rendering the opinion of the court, "are homely and familiar maxims, scarcely requiring citation, and yet the Declaration of Rights itself (Art. 18) admonishes us that a frequent recurrence to them is absolutely necessary to preserve the advantages of liberty and maintain a free government; and that the people have a right to require of their lawgivers and magistrates an exact and constant assurance of them."

The Constitution of West Virginia (Art. III, 20) contains the same admonition.

After commenting upon the unwarrantable search permitted by the act, and the fact, that whether the owner had notice was made contingent upon his being known to the constable, and the brevity of the notice in any case, the court says:

"But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us, quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial; no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute expressly directs, that if the owner fails to appear, or (that is, if he does appear) unless he shall prove that the liquor was lawfully kept, they shall be declared forfeited and the owner shall be adjudged to pay a fine and costs. There is no room for implication; judgment shall pass for the forfeiture and fine, unless the owner can prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure and the seizure itself are to be considered as legal proof * * We have only to look at the plain directions of the act, to perceive that it provides for no trial, in any proper or judicial sense; that it permits a judgment of forfeiture, if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice and contrary to the letter and spirit of the Declaration of Rights. This statute declares that a subject may be deprived of his property under the form of law, without meeting the witnesses face to face, without being fully heard in his defense, in an unusual mode, not by the judgment of his peers, or the law of the land."

*Hibbard* v. *The People*, 4 Mich. 125, arose upon a very similar act which was by a unanimous court held to be void upon like grounds, the Court saying in part:

"It has been said that the proceedings under the Liquor Law *may* be so conducted, consistently with its provisions, as to secure the person whose property is seized all his constitutional rights. If this is *possible*, that is not enough, the law must afford to the accused the means of *demanding* and enforcing his constitutional rights, and if it authorizes a course of procedure which would deprive him of them, it is void."

*Boggs* v. *The Commonwealth*, 76 Virginia, 989.

The act of March 6th, 1880, provided for the forfeiture, (confiscation) of vessels employed in violating the Oyster laws.

The persons operating the vessel in question, were found guilty of violation on the trial, and were convicted, and the boat was sold by the sheriff at public auction, according to the terms of the statute.

It was held by the Court that the intention of the law was to operate upon the offending vessel, but that the conviction of the persons offending, was not necessarily a conviction of the vessel; and that no proper proceedings having been had for the condemnation of the vessel, none being provided by the act, the sale by the sheriff passed no title as against owners of the vessel.

"Forfeiture of rights and property cannot be adjudged by legislative act and confiscation without a judicial hearing after due notice would be void as not being due process of law."

This case is of special interest as recognizing principles that were overlooked or denied by the same court in the earlier forfeiture cases in 10th and 11th Grattan that will hereinafter be considered.

The reasoning of the court follows that in *Fisher* v. *McGirr* and *Hibbard* v. *The People*, supra, which are cited, and the court holds the statute unconstitutional because the act "requires no notice, personal or otherwise; it makes no provision for any mode of trial, when the owner appears and asserts his title," and speaking of the possible defenses that the owner may have, the court says:

"Whatever they may be, the act of the legislature affords him no opportunity of presenting them to the court. No notice, actual or constructive, is required of the seizure of the vessel, and no provision is made for a hearing or a trial."

In all these cases, counsel for these defendants in error would have urged that if the persons complaining of the law had any defense to make, they could *show their innocence* as well in the proceeding in which they make such complaint, as in any other, and that then and there, upon *habeas corpus* even, the question of their guilt or innocence could be settled, and that the presentment of an indictment or other information or complaint by the State before they should be deprived of life, liberty or property, was an old fogy proceeding, unadapted to these progressive

times. And they would no doubt have made even shorter work of it, by saying there could be no defense. These cases impress one as constituting full, complete and due administration of justice as contrasted with the utter want of any proceeding or process in the Article in question in the case at bar.

*Wong Wing* v. *United States*, 163 U. S. 228, recently decided by this Court, is decisive of the question before us. In this case it was held, that the United States can forbid aliens from coming within their borders and can expel them therefrom, and can devolve the duty of identifying and arresting such persons, upon executive or subordinate officials; "but when Congress sees fit furthur to promote such a policy by subjecting the persons of such aliens to infamous punishment by imprisonment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."

The court therefore held unconstitutional an act of Congress that provided for imprisonment as well as deportation of Chinamen coming into the United States contrary to law, the imprisonment being imposed through executive and administrative proceedings.

Here again counsel for these defendants in error would say, that the presence of the alien in the United States and his identification, was proof of his guilt, and that nothing was left to be adjudged; and that in the above case the fact of his guilt was apparent to the court and was not even disputed; and that the petitioner would have no defense to make in a judicial trial, and ought to be remanded to prison. Yet no one can doubt that such action would undermine the foundation of our liberties, and throw the administration of law and justice into anarchy and confusion.

Apply the principles of the above case to the one before us. When the State of West Virginia sees fit to promote any state policy by the confiscation of the property of land-owners, "such legislation, to be valid, must provide for a judicial trial, to establish the guilt of the accused." And to confiscate such property by legislative enactment, "would be to pass out of the sphere of constitutional legislation."

The heathen Chinaman, from whose social contact the world withdraws, is not too small, nor is the American citizen who owns or claims a thousand acres or more of West Virginia

mountains, too great, to find common shelter under the American Constitution, or to be objects of the care and protection of the law and the courts of this land.

*Ulman* v. *Mayor &c., of Baltimore*, 72 Md., 587. (Decided in 1890):

An Act of the legislature authorized the Mayor and Council of Baltimore to provide by ordinance for the grading, &c., of streets in that city, and for assessing the cost on the adjacent owners and collecting such assessment as other taxes are collected. An ordinance was passed for such purpose, making the tax a lien upon the property, but neither the Act nor the ordinance provided for notice to the property owners, that such improvement or assessment was to be made.

The court, after commenting on the want of notice that the ordinance would be or had been passed, or that the owners had been adjudged to pay the cost of improvement, and the want of opportunity to resist the exaction or appeal from it, says:

"If this be due process of law the provisions of the Federal and State Constitution and of Magna Charta itself are utterly meaningless and vain. Due process of law is not confined to judicial proceedings. The article of the constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the legislature free to make anything due process of law by its mere will and pleasure."

The court then quotes from *Stuart* v. *Palmer* 74 N. Y. 183, the following:

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule. This provision is the most important guarantee of personal rights to be found in the federal or State Constitution. It is a limitation upon an arbitrary power *and is a guarantee against arbitrary legislation.* No citizen shall be arbitrarily deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done. Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer* v. *Bruenbury*, 30 Mich, 201. This great guarantee is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

The above language was quoted with approval by Justices Matthews and Harlan in *Spencer* v. *Merchant*, 125 U. S. 358.

See also *cases* cited *infra*.

*Class Legislation, Denial of Equal Protection of the Laws.*

Laws that operate unequally upon the same class of persons or property, violate the provisions of the Fourteenth Amendment, and are void.

"The equal protection of the laws is a pledge of the protection of equal laws" *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Class legislation is discussed at length in *State* v. *Loomis*, 115 Mo. 307, 21 R. R. A. 789 and notes, and the cases therein cited. The court after discussing the expression "due process of law" says:

"From the foregoing description and definitions of 'due process of law', it must be evident that this Constitutional safeguard condemns arbitrary, unequal and partial legislation.

Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences that would serve for some purposes furnish no reason whatever for the classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

*State* v. *Goodwill* 33 W. Va. 179.

Act of the legislature undertook to regulate in certain ways, payment of persons employed by persons, firms, corporations and companies, engaged in mining and manufacturing, and did not embrace railroad companies, merchants and others employing labor. Held to be class legislation and in conflict with 14th Amendment and State Const, Art. III. 1.

"It is not competent for the legislature, under the constitution to single out owners and operators of mines and manufactories of every kind and provide that they shall bear the burdens not imposed on other kinds of property or employers of labor.

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy individual rights, or does the same thing by restricting the privileges of certain persons and not of others, when there is no public necessity for such discrimination is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another whereas a general law affecting the whole community equally, could not have been enacted."

The same doctrine is laid down in *State* v. *Fire Cr. C. & C. Co. Id.* 188; *Whally* v. *Kennedy*, 2 Yerg. 554; *Budd* v. *State*, 3 Humph. 483; *Frorer* v. *People*, 16 L. R. A. (Ill.) 492; *Millett* v. *People*, 117 Ill. 294; *Low* v. *Rees Printing Co.* 41 Neb. 127.

The application of this principle to the present case is obvious. Article XIII of the State Constitution makes a classification for legislative purposes "which has no reasonable basis upon which to stand." Horses weighing 900 lbs. each and similar horses weighing 1000 lbs. each might, with propriety, be put in different classes at a horse show, but not upon the assessors books. Tracts of land of 1000 acres and upwards and the owners thereof are made a class separated from exactly similar lands of 999 acres and their owners, similarly circumstanced and situated. The equal protection of the law is denied to the former. The owner of a tract of 1000 acres is *absolutely divested* of, and loses, his land, while the owner of a tract of 999.99 acres under identical conditions and circumstances, is not in the least affected. And this notwithstanding the fact, that the same section (sec. 6) of the article makes the "duty" of each the same, whatever may be the force of that requirement. In the language of the case above cited, is the difference between a tract of 999 acres and one of 1000 acres, or the owners thereof (the same person may own both tracts), "such as, in the nature of things, furnishes a reasonable basis for separate laws and regulations"? Is there any "public necessity for such discrimination"?

If it is replied that the legislature has subsequently passed an act which attempts to forfeit tracts of less than a thousand acres, it shows that in the opinion of the legislature there existed no justification for the classification, no "public necessity for such discrimination," and does not help the Article, which must stand or fall by itself, and can borrow no support from an act subsequently passed. It is the constitutional provision only that is on trial, and if it was invalid when adopted, it has remained so.

The Article is most obviously invalid for the reason indicated. It abridges the privilege, the right, of one citizen of the United States to hold and enjoy property upon equal terms with other citizens; it abridges his immunity from seizure, confiscation and spoliation in his property when violating no law and when uncharged with any violation; it denies to him the equal protec-

tion in his property, that is extended to others in like circumstances; it violates the principle of *equal rights* that is the foundation stone of our government.

*No State shall pass any Bill of Attainder, Expost Facto Law or Law impairing the Obligation of Contracts, Art.* 1 *Sex. X.* 1.

In the view defendants in error take of the forfeiture provision, it is in all essential respects a bill of attainder, or, what in contemplation of the constitution is the same, a bill of pains and penalties. It does not provide a penalty for what is, by the enactment or otherwise, declared to be an offense, leaving the question of guilt to be adjudged, and the punishment to be pronounced, by a court; but by mere enactment of a legislative body, the land owner is attainted and a sentence of confiscation is pronounced against him, leaving nothing to be done but for sentence to be executed without more ado, by any person who may profit thereby.

Whether the divestiture of the title of the land owner is to be regarded as the consequence of the act or omission of himself or of the officers of the State, or of both, it is so far as he is concerned, a punishment for something, and falls upon him.

It was held by this court in *Cummings vs.* the *State of Missouri*, 4 Wall 323, that "a bill of attainder is a legislative act which inflicts punishment without a Judicial trial," and that "such bills may be aimed at individuals or at a class and may inflict punishment absolutely or conditionally." In the present case the bill is aimed at a class, but the punishment is absolute and complete, when the victim is shown to belong to that class, a mere matter of identification, incident and indispensible to every case of the infliction of punishment, even when inflicted by a mob.

This case comes more fully within the prohibition of the Constitution, and the reasoning of the court in *Cummings vs. Missouri*, than the facts of that case did; and from that decision there would probably be no dissent at this day. This forfeiture law is harsher and more arbitrary than bills of attainder were wont to be.

In Hennings Statutes at large Vol. 9, page 463, is found an act of the General Assembly of Virginia, passed May, 1778, entitled "An Act to attaint Josiah Philips and others unless they render themselves to justice within a certain time," which is moderate by contrast with the West Virginia forfeiture law.

After reciting the crimes charged to Philips and his associates, it is enacted "that if the said Josiah Philips, his associates and confederates, shall not, on or before the first day of July of this present year, render themselves to the governor" &c. "in order to their trail for the treasons, murders and felonies by them committed, then such of them, the said Philips and his associates and confederates, as shall not so render him or themselves, shall stand and be convicted and attainted of high treason, and incur all forfeitures, penalties and disabilities prescribed by law against those convicted and attainted of high treason, and execution of this sentence of attainder shall be done by order of the general court, to be entered so soon as conveniently after notice that any of the said offenders are in custody of the public jail." The act further provides that after its passage "it shall be lawful for any person, with or without orders, to pursue and slay the said Josiah Philips and any others who have been his associates or confederates at any time after the said first day of July, provided that the person so slain be in arms at the time or endeavoring to escape being taken." Accordingly upon this act, introduced and passed in a single day, upon *exparte* and hearsay evidence, Philips and others were executed.

The outrage of this affair, excusable, if such a thing can be, in the disturbed times in which it occurred, and under the law as it then existed, while it did much to effect the abolition of acts of attainder, both in the State and Nation soon there after formed, did not prevent the State in 1835 and previously, from passing acts for the forfeiture of lands, modeled upon this act of attainder. From those acts the inspiration for the West Virginia provision was drawn, and upon them counsel for defendants in error pin such faith and hopes as they have. They will be considered hereinafter.

This act of attainder, like the forfeiture acts of later date, had the advantage of certainty as to the time when its effect should be complete, that the present forfeiture act has not. The ones at whom it was aimed, if in any way they knew that they were within its purview, knew what they had to do and could do and just when to do it, to avoid the effect of the act. The act related to a *single day certain* in the *future*, and did not operate over three years of the past and all eternity to come.

The forfeiture provision under consideration, properly interpreted would be to this effect:

Whereas &c. Be it enacted: That if all owners of tracts of

land of one thousand acres or more shall not, for any five years after the year 1869, be charged by the officers or agents of the state, with state taxes upon said tracts of land, such of the said land owners as shall not have been so charged with such taxes for any such five years, shall stand and be, by operation hereof, convicted and attainted of "crimes unknown," and shall suffer forfeiture of said lands, and the title of such owner is hereby divested out of them and is vested in any person (other than the heirs or devisees of said owners) who may covet the same and lay violent hands thereon. Provided it shall be lawful for any such person, from and after this date, to enter, with or without process of law, and seize, take and hold such lands.

In *Cummings* v. *Missouri*, in discussing the provisions in the constitution of the State, that, among other things, declared certain past acts to be criminal, fixed the penalty therefor, and prohibited all priests and ministers of the gospel from performing the functions of their calling, unless they should take oath that they had not been guilty of the offences mentioned, this Court said:

"If these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a certain day designated, do certain specific acts, they would be no less within the inhibition of the Federal Constitution." (325).

I submit that, if the Constitution of West Virginia had declared, that all such land owners should be guilty (of some offense) and be thus deprived, provided a certain specified thing (the taxing of their lands) should not be done for or within a certain, or *uncertain*, time, such provision would be not more within the prohibition of the Federal Constitution than is the provision in its present form, and in either case "there would be," to use again the language of this Court in *Cummings* v. *Missouri*, "the legislative enactment creating the deprivation without any of the ordinary forms and safeguards provided for the security of the citizen in the administration of justice by the established tribunals."

In the "Liquor cases," (*Herrick* v. *Smith*, 1 Gray, 16) Rufus Choate, Attorney General, admitted and declared "The forfeiture is nothing but a fine equaling in amount the value of the liquors." When defendants in error declare that the West Virginia forfeiture is because of the land owners' default, they are

estopped to deny that the Article imposes "a fine equalling in amount the value of the land." What more could a bill of attainder do?"

*Violating the Obligation of a Contract. Ex Post Facto Laws.*

This forfeiture law undertakes to create a condition that was not in the original grant either in terms or by implication, nor in the law under which the grant was issued; a condition by which the grant, absolute and unqualified when made, shall terminate and revert to the State upon the happening of an event over which the State alone has the control, the non-assessment of State tax. In this respect it impairs the obligation of a contract.

The provision, adopted in 1872 operates back to 1869, and is *ex post facto*, and retroactive as to all grants prior to 1872.

It requires neither argument nor citation of authorities to sustain these positions. It conflicts with both the said Art. I. of the Federal Constitution and its counterpart in the State constitution, Art. III, 4.

*Article VIII, Amendments to Constitution.*

**Excessive Bail shall not be required, nor Excessive Fines be Imposed nor Cruel and Unusual Punishments be inflicted.**

To the above provision of the Federal Constitution the State constitution adds. "Penalties shall be proportioned to the character and degree of the offense, Art. III, 5."

If this forfeiture rises to the dignity of a penalty or punishment for the doing or omission of something by the land owner, as it is commonly asserted to be, it falls squarely within the above prohibitions.

It may be urged that the Eighth Amendment is a restriction upon the federal government only; but it is to be remembered that the state constitution declares, that the Constitution of the United States shall be the Supreme law of the land, the effect of which declaration is, I submit, to make this Amendment operative, whether it otherwise would be or not, and to make Art. XIII of the State Constitution, subordinate to it; and it is, likewise subordinate to Art. III of the State Constitution, reenacted from the earlier Constitution (Art. II, 2.)

But whether Art. VIII of the Amendments to the Constitution, *as such*, is operative or not, the provisions it contains are

operative, as part of the "law of the land," and this has been so from remote times.

> For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted, (which at a retrospect to some unprecedented proceedings in the court of king's bench in the reign of King James the second); and the same statute further declares that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. Now the bill of rights was only declaratory throughout of the old Constitutional law of the land; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times undue means and more violent prosecution would be used for private lucre than the quiet and just proceedings of law would permit. IV Blackstone Com. 379.

So that, without the amendment, or Art. III of the State Constitution, the infliction of cruel and unusual punishments and the imposition of excessive fines, is prohibited by the Fourteenth Amendment, for the infliction of unusual punishments or excessive fines or penalties, is depriving one of life, liberty or property without "due process of law" and contrary to the "law of the land"; for these expressions are broad enough, and are intended and ought to be, broad enough, to shield "any person" within the reach of the laws of this nation, from every unjust and unusual exercise of power.

This forfeiture, then, as a penalty or punishment, is most astounding. There is no other crime (!) known to the law of this State, the conviction and sentence of which works forfeiture. A person might murder all the officers of the State government and burn down the Capitol City, and not suffer forfeiture of his estate, if convicted.

The punishment for treason against the United States, the greatest political offense against the greatest government on earth, is not visited so harshly upon the estate of a convicted traitor, as is attempted in this Article to deal with the estate of the West Virginia land owner, who is convicted of no crime, and charged with do offense. Is a fine or a penalty amounting to millions of dollars a "usual punishment" for an offense (?) of such a kind? or is "proportioned to the offense"? Failure to list a tract of one acre, and to have it charged with taxes, is exactly the same offense, if it be one at all, as failure to list a tract of a thousand acres and to have it charged with taxes. It is a mere want of action, a doing of nothing, a negation, without degree of evil; yet the penalty in one case is infinitely greater, for the same offense, than in the other, for in the latter there is

none. What must be the magnitude of an offense for which the minimum punishment is a fine of one thousand acres of land?

There would be as much justice and authority of law, for the State to impose a fine of a million dollars upon the land owner or claimant, and imprison him until he should pay it, as to confiscate property of that value; and in the present case it would be more appropriate, for then the penalty would have fallen upon the trustee, if he has failed in any duty, and not upon the unoffending purchaser.

But perhaps instead of feeling that the State has dealt severely with the unhappy land owner, whose land, by any chance whatever, the State may not have charged upon the land books, we ought rather to extol her mercy in not adding disfranchisement and corruption of blood to the punishment by forfeiture. We are not, however, without honorable companionship in our opinion and sentiments. Judge Nicholas, in *Gaines* v. *Buford*, *supra*, in like case, has this to say:

> Thus, by comparing the act of 1824 with the constitution, I find that while the legislature are expressly prohibited from passing laws to forfeit the estates of attainted traitors and felons, except during life, they have undertaken to forfeit forever the estates of those who have been guilty of no crime, unless it be a crime to have the better title to a tract of land held adversely by another. This contrast fortifies my conviction that the legislature does not possess the power to pass a bill of forfeiture like this. When the estate of an attainted felon can only be forfeited during life, it is not, within the contemplation of the supreme law, an excessive fine or a cruel punishment to forfeit forever the estate of a man, merely because he is unwilling and fails to improve it, even if he could? The constitution says, "that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

*This Forfeiture Provision Cannot Operate ex Proprio Vigore Because There must be an Inquest of Office.*

It is a well-established and understood principle, that in order to make effectual a forfeiture of franchises or property to the sovereign power which granted the same, in order to escheat or confiscate lands or to divest and forfeit to the State any interest which is liable to forfeiture, there must be a judicial proceeding for that purpose. The facts must be found and the forfeiture must be adjudged by a tribunal having jurisdiction.

When for any cause lands escheated or were forfeited to the English crown, an inquest of office or "office found," was neces-

sary before title was vested in the crown. The case was heard and determined by a tribunal which decreed the forfeiture or escheat, and then, and not until then, was the property forfeited or escheated.

Blackstone, vol. 3, 358.
Kent's Commentaries, 13th edition, vol. 2, p. 68 (54).
Washburne on Real Property, 5th edition, vol. 3, 52.
Minor's Institutes, vol. 2, 544 (479) and cases cited.

*Kinney* v. *Beverly*, 2 Hen. & Mun. 318, decided as long ago as 1808, is a clear exposition of the law upon this subject. The effect of the tax law of 1792 is discussed. The important clause of the law under the consideration read as follows:

> That in case the tax on any tract of land shall not be paid for the space of three years, the right to such lands shall be lost, forfeited and vested in the commonwealth; and it shall be lawful for any person to acquire a title to any lands *so forfeited* in the manner prescribed for acquiring titles to waste and unappropriated lands on the eastern waters, by an act entitled, "An Act to dispose of waste and unappropriated lands in the Commonwealth of Virginia on the eastern waters."

The question was whether the failure to pay the taxes for three years operated to forfeit the land without any inquest of office. Judge Tucker, in an elaborate opinion, says:

> And, in both cases, the authority of Brooke, *tit.* Office, 17, was relied on to this effect. Where a man is attainted by parliament, and thereby it is ordained, "that all his lands shall be forfeited, and it is not said, they shall be in the king without office, there they shall not be in the seisin of the king, to *grant over* without *office*, for it does not appear of record what lands they are." So, in the present case, although the taxes be not paid on certain lands, the property of A, in the county of B for the space of three years, whereby the right to those lands is forfeited to the commonwealth, yet until an office be found or some other legal proceeding had (if any such be pointed out), to show the certainty of the land, the seisin thereof is not in the commonwealth to grant over; and, without such seisin, any grant thereof would be void by the common law; for the commonwealth, having but a right, and not a seisin, cannot make a grant of lands, as was adjudged in Dowtie's Case, 3 Co. 10. And this construction of the act is confirmed in my opinion, by the remarks of Sir Edward Coke (2 Inst. 221) upon that clause of the statute of Westm. 1, c. 31, which relates to tolls, by which it is declared, that if excessive toll be taken in any city, etc., the king shall seize the franchise of the fair or market, until it be redeemed by the owner. "But," says Lord Coke, "this is intended upon *an office found*; for, in statutes, incidents are ever supplied by intendment."

The Act of 1864, before noted, prescribing the punishment of

treason to the State, declares, "Whoever shall be guilty of treason against the State shall be punished with death * * and by confiscation of his real and personal estate;" but it is presumed that this would be held, even in West Virginia, to be upon conviction and sentence.

*Barber vs. Nelson*, 1 Little, 60, holds under the Kentucky statute, declaring lands of non-residents to be forfeited if omitted from land books, that there must be an inquest of office, though none is provided for, and that without it, the land though liable to forfeiture, is not forfeited.

*Thevenin vs. Slocum's Lessee*, 16 Ohio, 519, decided in 1847, was an action upon a title claimed by virtue of forfeiture under an act of the legislature, which provided that lands not sold for the want of bidders, should be forfeited to the State. In holding that the title of the owner of the lands assessed and not sold for the want of bidders, *was not divested* by reason of such alleged forfeiture, the Court says:

"But the Legislature have never treated this forfeiture as vesting the title in the State, for any other purposes than a lien for taxes due and owing, and wherever this forfeited land has been sold, it has been done under laws providing that if sold for more than the taxes due, the surplus should be placed to the credit of the former proprietor.

"In an action by such proprietor for the recovery of such forfeited land, we do not suppose that the defendant could defeat plaintiff's action by showing merely that the land had been forfeited; he must show in addition that the land had been sold as such forfeited land. Proving an outstanding title in the State by forfeiture would not be sufficient."

In *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 602, which was a writ of error from the Supreme Court of Appeals of Virginia, the syllabus reads :

Lord Fairfax at the time of his death, had the absolute property, seizin and possession of the waste and unappropriated lands in the Northern neck of Virginia.

An alien enemy may take lands in Virginia by devise, and hold the same until office found. The Commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck until its title should have been perfected by possession.

This case recognized the principle that even though the lands were subject to being divested out of the alien and transferred to the State, yet that could only be done by inquest of office, until which was had, the legal title remained in the alien.

In *Wynehamer v. The People*, 13 N. Y. 378, Judge Selden, in the course of his opinion says of "due process of law":

"It may be said the constitutional provision in question cannot, in the nature of things, apply to a case when a law enacted for beneficient purposes, operates directly upon its subject, and thus accomplishes *per se* the end in view; that in such a case it is impossible to interpose any judicial action between the enactment and its execution; and that the clause can only apply to cases where there is to be some manual interference with the rights of person or of property. But there is no such limitation in the constitution; and the few guarantees it contains, should not be curtailed by any narrow or refined process of interpretation. Such a construction would certainly nulify the provision, as the most oppressive and tyrannical ends may be accomplished by simply withdrawing from individual rights the protection of law. All vested rights to franchises would be placed by this interpretation, so far as the State Constitution is concerned, entirely at the mercy of the legislature. To give the clause, therefore, any value, it must be understood to men that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty, or prosperity, except as the consequence of some judicial proceeding, appropriately and legally conducted. It follows that a law, which, by its own inherent force, extinguishes rights of property, or compels that extinction, without any legal process whatever, comes directly in conflict with the constitution."

In England there could be no forfeiture of lands for criminal offenses, except upon the sentence of the offender, for "lands" says Blackstone, " are forfeited upon attainder and not before" (IV Bl. Com. 387) and not therefore upon the *commission of the offense*, and "attainder follows sentence and does not attach upon conviction only." Id. 381.

So strict and inavriable was this rule that there could be no forfeiture in the case of *felo de se*, because there could be no sentence of the *felo*.

*Bennett* v. *Hunter*, 9 Wallace, 326, construes the Act of Congress of June 7th, 1862, levying a tax upon land within the several States, to provide a revenue to carry on the war. The action was brought in the Ciruit Court of Alexandria County, taken to the Supreme Court of Appeals of Virginia, and thence by writ of error to the Supreme Court of the United States. Mr. Justice Chase said, explaining the fourth section of the act:

"This section provides 'that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.'

"And we are first to consider whether the first clause of this section, *propio vigore*, worked a transfer to the United States of the land declared to be forfeited.

"The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government, a policy which had reference to the suppression of rebellion rather than to revenue. But this purpose did not affect the operation of the act before sale, for until sale actually made there could be properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt, and it seems unreasonable to give to the act considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed, and relieve his land from the lien. The first clause of the act, therefore, is not to be considered as working an actual transfer of the land to the United States, if a more liberal construction can be given to it consistently with its terms.

"Now the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested, by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Fairfax's Devisees* v. *Hunter's Lessees*, 7 Cranch, 625. In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office. 3 Bl. Com. 258. And so of other instances where the title of the sovereign was derived from forfeiture. * * *

"Applying these principles to the case in hand, it seems quite clear that the first clause of the 4th section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely: Non-payment of taxes while the second clause was intended to work the actual investment of the title through a public act of the Government of the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary and independently of the sale, worked no divestiture of title. The title indeed was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and upon public sale became actually vested in the United States, or any other purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with the remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States."

Here was a provision, that upon failure to pay the taxes the title should "*thereupon* be vested in the United States," and it was "insisted earnestly" by counsel that such should be the ef-

fect without further ado; but the Court held otherwise. There was a tax actually, and, we may suppose, lawfully, levied, the proper and natural enforcement of which was by a tax sale. The term "forfeiture" had no application whatever to the case, as it has to no case except to that of estates and rights held upon some condition; and we submit that the learned Chief Justice was betrayed into a qualified approval of its use by its occurrence in the statute.

Judge Holt, in a very recent case, involving the validity of a tax title says:

> * * * It was not the object of this proceeding, as we have seen, to enforce any forfeiture, incipient or complete, resulting from omission, or to give the sheriff power to sell any other title derived from any other source than the one listed and assessed. We may be sure this is so, because the legislature has no power by this proceeding to transfer her [plaintiff's] title to the purchaser in any other way. It cannot, without some notice or proceeding in the nature of an inquest, declare her land forfeited for omission, non-payment, or for any other cause; and, if it could, it cannot in this mode pass her title to another, for the constitution stands in the way. Art. XIII, if not sec. 10 of Art. III. *Cunningham* v. *Brown*, 39 W. Va. 597.

The Supreme Court of Appeals of West Virginia has not passed upon the question before us, but it is not difficult to see what would be its decision, if we are permitted to judge from the language of one of the most learned judges of that court at any time, in delivering the opinion of the court in the above case. The language is without limitation in its scope or application.

This question, and also the question of the validity of the statute of the State for the forfeiture of tracts of less than one thousand acres, otherwise identical with the constitutional provision, is pending at the present time before the said court.

Under this branch of the subject may be cited all the cases that follow, especially, *Buford* v. *Gaines*, 2 Dana; *Marshall* v. *McDaniel*, 12 Bush. 378.

*To Declare a Forfeiture is a Judicial Act and is Prohibited to the Legislature. The Forfeiture Contended for in this case is Legislative and Therefore Unauthorized.*

> The legislative, executive and judicial departments shall be separate and distinct so that neither shall exercise the powers properly belonging to either of the others." Art. V, sec. 1, Const.

The theory of our State governments necessarily prohibits the legislative department from exercising any executive or judicial functions, and *vice-versa*.

The first enactment of the Constitution of Virginia, adopted June 29, 1776, is:

> The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the power of more than one of them at the same time, except that the justices of the County Court shall be eligible to either House of the Assembly.

In *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 663, a case of much note, dealing with the power of the legislature, this Court, speaking by Mr. Justice Miller, has declared:

> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who are husband and wife to each other, should be so no longer, but that A should hereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should be no longer his, but should henceforth be the property of B.

*Calhoun* v. *Fletcher*, *supra*.

> The doctrine is settled that it is not in the power of the Legislature, by legislative direction, to divest the title of the owner.

*Wynehamer* v. *People*, 13 N. Y. Court of Appeals, *supra*, discusses the question before us ably and at great length, several of the judges delivering opinions. The case arose upon a statute relating to the use and sale of liquors, the restrictions being such as, in the opinion of the Court, to destroy the value thereof, and consequently to deprive the owner of his property by act of legislation, and therefore without due process of law.

Judge Johnson, in his opinion therein, says:

> "The constitutional provision was intended to protect property from confiscation by legislative enactment, and from seizure, forfeiture and destruction without a trial and conviction by the ordinary modes of judicial procedure."

In *People* v. *Toynbee*, 20 Barb. 219, upon the same statute, the Court says:

"An act of the legislature is not the due process of law mentioned in the Constitution. The words, as remarked by Judge Bronson in the case last cited, (*Taylor* v. *Porter*) cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms of ascertaining guilt, or determining the title to property. In other words, a man cannot be legislated out of life, liberty or property."

Cooley, on Constitutional Limitations, discusses this question in chapter 5, pp. 109-11 (5th edition). We find there the following quotations from the following cases, each of which is approved by Judge Cooley.

"I entertain no doubt," says Comstock, J., in *Wynehamer* v. *People*, 13 N. Y. 378, 341, "that aside from the special limitations of the Constitution the Legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the Constitution distributed to other departments of the government. It is only the legislative power that is vested in the Senate and Assembly."

In *Merrill* v. *Sherburne*, 1 N. H. 199, 203, Woodbury, J., in speaking of the respective functions of the judicial and legislative departments of the government, said:

"In fine, the law is applied by the one and made by the other. To do the first, therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act, but to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act."

In *Wayman* v. *Southard*, 10 Wheaton, 36, Chief Justice Marshall said:

"And the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judicial construes the law."

In *Newland* v. *Marsh*, 19 Ill. 383, we find.

"The legislative power extends only to the making of the laws. It is limited and restrained by the paramount authority of the Federal and State Constitutions. It can not directly reach the property or vested rights of a citizen by providing for their forfeitures, or transfer to another without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."

In *Wilkinson* v. *Leland*, 2 Pet. 657, (1829) Mr. Justice Story says:

"In a government professing to regard the great rights of personal liberty and property, and which is required to legislate in subordination to the general laws of England, it would not be lightly presumed that the great principles of Magna Charta would be disregarded, or that the estates of its subjects were to be taken away without trial, without notice and without offense. Even if such authority should be deemed to have been con-

fided by the Charter to the general assembly of Rhode Island, as an exercise of transcendent authority before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subject to its uncontrolled and arbitrary exercise.

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no courts of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice, and civil liberty lurked under any general grant of legislative authority.

"We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of the legislative power, in any state in the Union. On the contrary, it has constantly been resisted as inconsistent with first principles by every judicial tribunal, in which it has been attempted to be enforced."

This case concerned an act of the legislature of Rhode Island, attempting to confirm and make valid a sale of property made without authority. Rhode Island had no written constitution, other than by Royal Charter, which permitted the colony to make laws not in conflict with the law of Great Britain.

In *the University of Maryland* v. *Williams*, 9 Gill. & J. 375, Chief Justice Buchanan says:

"Independent of that instrument (the Constitution of the United States) and of any express instructions in the Constitution of the State there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), in the character and genius of our government—the causes from which they spring, and the purposes for which they were established—that rises above and restrains and sets bounds to the powers of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power.

"To say that the Legislature possesses the power to pass capriciously, or at pleasure, a valid act, taking from one his property and giving it to another, would be, in this age, and in this State, a startling proposition; to which the assent of none could be yielded."

*Wilkinson* v. *Leland*, 2 Pet. 657.

"We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held to be a constitutional exercise of legislative power in any state in the Union. On the contrary it has constantly been resisted as inconsistent with first principles in every tribunal where it has been attempted to be enforced."

*Brown* v. *Hummel*, 6th Barr. (Penn.) 90:

"The Constitution of the State of Pennsylvania vests the powers of government in three departments—legislative, executive, judicial; and each of

these, as well by the express terms of the instrument as by common right, and the liberty of the citizens, are confined within the limits of their respective and appropriate spheres of action. If this Court should attempt to issue general edicts, without confining itself to hearing and adjudicating cases brought before it by the usual process of law, it would be guilty of usurpation; and its rescripts would fall dead and harmless upon society."

*Groesbeck vs. Seeley*, 13 Michigan, 329, was a case involving the validity of the statute purporting to vest an absolute and unassailable title in the State to all lands bid off by the State at tax sale, and not disposed of for five years, regardless, of course, of the validity or invalidity of the sale. Plaintiff's claimed under deed from State, and defendant was in possession.

The Supreme Court held the statute to be invalid as taking property without due process, in that no opportunity was given to prove the invalidity of the title which was to be made good by the mere lapse of time, the party against whom it was asserted, being in possession.

The Court observed: "To hold that under any circumstances a man can be deprived of a legal title without a hearing, is impossible, without destroying the entire foundation of constitutional protection to property," and held the statute to be void saying:

"If this tax title can be made indefeasible against a title in possession, by mere lapse of time, it may as well have been declared so originally. It would in either case be nothing more or less than depriving one of his property without any legal process, and is simply a confiscation by ministerial and judicial action."

Opinion delivered by Judge Campbell, Judges Cooley and Christiancy concuring.

See also *Scott v. Toledo*, 36 Fed. 385; *Taylor v. Porter* 4 Hill, 128; *Boggs v. The Commonwealth*, 76 Va., 989; and other cases *supra* and *infra*.

The class of rights of which forfeitures most frequently occur are corporate franchises and charters, and the attempt to prove such forfeitures most frequently is made in suits brought by corporations.

Charters and franchises are grants of limited, qualified or conditional rights or privileges. They are held upon condition, and upon breach thereof the charter or franchise is liable to forfeiture, as a penalty; but though a corporation exceed and abuse its powers or commit acts that are unlawful, or that the statutes declares shall forfeit the charter, it continues neverthe-

less to exist as a corporate body until the government which created it shall, by a proper proceeding, procure an adjudication and enforce a forfeiture of the charter, *Ormsby* v. *Vt. Copper Mining Co.* 65 *Barb.* 360; *People* v. *President and Directors, Manhatten Co.* 9 *Wend* 351. The corporation can only be attacked or the forfeiture enforced by or at the instance of the State in a direct proceeding therefor and not collaterally. *State* v. *Fourth N. Y. Turnpike*, 15 N. H. 115 and cases cited.

## "DUE PROCESS" CONTINUED.

*The Prohibition of the Fourteenth Amendment Applies to Every Department of State Government and Limits the Powers of the State However Exercised.*

The objectionable forfeiture provision appears in the State constitution, it is true, but the prohibition of the Fourteenth Amendment to the National Constitution is general—"nor shall any State deprive any person," etc. The attempt is equally futile whether it be made in one manner or another; whether, by the adoption of a constitution, the passage of a statute, or by executive act. Were this otherwise, a State, by adopting a constitution, could nullify this prohibition at will. But this cannot be done in any way. In the Article at bar, it is the State directly and in its own name, that attempts to deprive the land owner of his property, and this case is typical of the thing it was intended to make forever impossible in this land. *Scott* v. *Toledo* 36, Fed. Rep. 385; *Cummings* v. *State* of *Missouri* 4 Wall. 277; *Gunn* v. *Barry* 15 Wall. 510; *Pearce* v. *Kitzmiller* 19 W. Va. 577.

*Scott* v. *The City of Toledo*, 36 Fed. 385: Appropriation of land by a city for a public street, under an ordinance, authorized by statute, requiring the remaining land of owners to be assessed for the cost and expenses incident to and resulting from the appropriation and expenses of laying off and opening the street, without requiring compensation to be first made to the owners for the land so taken, held to be a violation of requirements of 14th Amendment to the Constitution of the United States, that 'no State shall deprive any person of life, liberty or property without due process of law.' Opinion by Jackson J., in which the question is elaborately discussed.

"The single question presented, therefore," he said, "is whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner of the property so appropriated. In other words, may a State or any subordinate division therof, since the adoption of the 14th amendment to the Constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law', without which the citizen cannot, under this 14th amendment, be deprived of his property by the State, involve as a necessary and essential ingredient, the payment or making a compensation for private property, appropriated to public use.'

And it is held by the Court that such taking without compensation is not "due process of law" contemplated by said 14th Amendment, quoting the following passage from *Davidson* v. *New Orleans*, 96 U. S. 102:

But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby invested in B, would if effectual, deprive A of his property without due process of law within the meaning of the constitutional provision. * * *

If a state by its laws, should authorize private property to be taken for public use, without compensation * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled, under the 14th amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and if found to be suitable or admissable in the special case, it will be adjudged to be 'due process of law,' but, if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law'.

And the Court further justly declares:

"Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that since thatamendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt to do so, whether done in pursuance of a *constitutional provision* or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly,

*by taking the property of one person and vesting it in another, or the public*, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the Court on this question is that since the adoption of the 14th amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law' and that, without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. * * * "

The doctrine laid down in the above case, and especially the language of this court adopted from the *Davidson* v. *New Orleans*, is conclusive of the question before us. Apply it to the present case. The Article in question "declares in terms, and without more, that the full and exclusive title of a tract of land which is now in A, is *hereby* invested in B," "by operation hereof shall be vested"; and (sec. 3.)"the title to lands heretofore or hereafter forfeited or *treated as forfeited*" (whether they be so in fact or not) "shall be and is *hereby transferred to and vested in* any person" &c. It has seemed to this Court, and must so seem, that such an act would, "if effectual, deprive A of his property without due process of law within the meaning of the Constitutional provision." And there can be no doubt of it. The State constitution is as impotent and ineffectual to do this as is a town ordinance. And furthur, the taking in the present case is not for a public purpose, not upon compensation and not for anything declared to be a crime or any offense.

*Scott* v. *McNeal*, 154, U. S. 34. Writ of error to Supreme Court of State of Washington.

Plaintiff not being heard from for seven years was adjudged by State Court to be dead, administration was granted upon his estate and land sold by administrator. Plaintiff comes to light and brings ejectment for the land. Judgment for defendant in Supreme Court of the State. Held that:

To hold such administration valid against him would deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, * * "Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the effect of divesting him of his property is a direct violation of this constitutional guaranty."

In the course of his opinion, Mr. Justice Gray, quoting the

provision of the said Amendment which prohibits a state from depriving any person of his property or denying the equal protection of the law, says:

> These prohibitions extend to all acts of the state whether through its legislative, executive or judicial authorities. And the first one, as said by Chief Justice Waite *United States* v. *Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.'
>
> Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that court's construction of a statute of the Territory or of the State, when the question is, whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State. * * * In every such case this court must decide for itself the true construction of the statute."

"Law" is defined by Webster's dictionary as "a rule, *particularly* an established and permanent rule, prescribed by the supreme power of a State to its subjects, for regulating their actions, particularly their social actions. Laws are imperative or mandatory, commanding what shall be done; prohibitory, restraining from what is to be forborne, or permissive, declaring what may be done without incurring a penalty."

It would seem doubtful if the common law of England, which arose out of the habits and customs of the people in their general social intercourse and relations, can be said to be "prescribed by the supreme power of the State," as the words are commonly understood: but in the broader and truer sense, the people of England have been the supreme power, and thus the common law, if not "prescribed by," at least originated from, the supreme power of the State. The word "Law," then, as used in the expression "law of the land" and "due process of law," can mean nothing less than a general, pre-existing rule for the regulation and government of the actions of persons within its jurisdiction and operation, and the definition above given, comprehensively describes and defines the word as it is commonly used; and within that definition cannot be embraced final judgments, decrees and sentences, which do not lay down rules of action, but by their operation divest and transfer titles or inflict punishments, and which, whether they are within the legal competency of the body from which they emanate, or are bold usurpa-

tions of power, are not "the law of the land" in the contemplation of Magna Charta, the Federal Constitution or of any instrument where those sacred words are used.

*Private Property shall not be Taken or Damaged for Public Use Without Just Compensation.*

Such is the law throughout the land, independent of any enactment to that effect, for such taking would be without due process of law, as discussed in *Scott* v. *Toledo*, *supra*, (36 Fed. Rep. 385).

The right of the State to acquire property, real or personal, is limited and confined to public use, and public need. Under the law of eminent domain, a State can acquire land for a public road, a public building, or other public purpose, but it has no right to take land for the private use of its officers or to make a gratuity of it to any person. By taxation, which is but a branch of the eminent domain, a State can acquire property—money—but the purpose for which the tax is levied must be a public one or the tax is void, and a sale of property in its enforcement passes no title. The State cannot become the purchaser of property at tax sale, except in default of other bidders, and to avoid loss of tax. Why? Because the State has a public need of the tax and not of the land.

It may safely be laid down as the universal law that a State can acquire property, upon just compensation, under the law of eminent domain (including taxation, the benefits of government being the compensation) for a public purpose; by confiscation of property engaged in violation of law; by the enforcement of a fine or penalty as punishment upon conviction and sentence for an offense; by gift; by inheritance for failure of other heirs; by escheat for alienage; by *forfeiture* where it has conveyed property upon condition which has been broken; and in no other manner.

The taking of private property for private use of another has been a thing so undreampt of that it seems nowhere to have been prohibited in express terms. Such taking will hardly be thought, for that reason, to be the less unauthorized and intolerable. And yet, this is exactly the taking contemplated by secs. 3 and 6 of this Article XIII. The Article, and its authors, had no other purpose; and it is readily perceivable from the provis-

ion made in sec. 3, that whenever land is "forfeited or treated as forfeited," it could, "if effectual," have no other effect, at least as to a large portion of any large and ancient grant, and that there would not be wanting claimants of one sort or another of the kinds described, to whom, and not to the State for any purpose, the title would pass immediately upon the happening of the event, (the mere expiration of the time), whom the title would be "transferred to and vested in." If any part of the land thus goes or may go to a private person, the whole tract and the law are tinctured with that private interest. The State derives no benefit from such a transfer, the public none, nor is either interested therein. The State is at most but the dry trustee during the instant of time occupied in the transition of the title from one private person to another, through the State, if indeed it goes through the State at all, where the instrument of the "transfer," (the Article of the Constitution) is executed in advance of the transaction by which it takes effect.

There need be no privity between the State and the beneficiary of this gratuity, a possession under a bogus claim of title and payment of taxes for five years sweeps away from both the State and this plaintiff land upon which taxes have been paid by plaintiff 's predecessors for more than eighty years. The bestowal upon strangers is as gratuitous and prodigal as the spoliation of the owner is despotic and rapacious. Not thus did Caesar despoil conquored provinces; and an edict like this enactment, in the days of Nero, would have led Rome to mutiny.

Our courts have expressed themselves upon mild approaches toward this culminating monstrosity of legislation.

In *Varick* v. *Smith*, 5 Paige, 159, in discussing eminent domain, Chancellor Walworth says:

"The principles upon which forced sales of private property, were compelled by the civil law, for the public good, were certainly as extended as any government can ever claim, consistently with the private rights of its citizens, and it is not pretended that even under the arbitrary government of the Roman Emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another, where the public interest was not concerned in such transfer.

Perhaps in England, where the power in parliament is said to be omnipotent, so far as the exercise of human power is concerned, there may be no remedy for such an abuse of power, where it is a concurrent act of the three estates of the realm. But in a State that is governed by a written constitution, like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it

to another where there was no foundation for a pretense that the public was to be benefitted thereby, I should not hesitate to declare that such an abuse of the right of eminent domain, was an infringement of the spirit of the Constitution, and therefore not within general powers delegated by the people to the Legislature."

Senator Tracey in *Bloodgood* v. *M. & H. R. R. Company*, 18 Wend. 56, says:

"It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded on fixed laws, however firm the government might be, to take the property of one individual or subject, and bestow it upon another. The exercise of such a power would be incompatible with all government, and would subvert the foundation principles upon which the government was organized. Such power was expressly repudiated at the height of despotism in the Roman Empire."

*Vanhorn's Lessees* v. *Darrance*, 2 Dal. 304 (1795) concerned the validity of an act of the Legislature of Pennsylvania, which sought to bestow upon persons claiming title from Connecticut, certain lands lying in Pennsylvania and claimed and owned by citizens thereof. In the course of a learned and unusually well expressed opinion adjudging the act invalid, Judge Patterson, speaking of the taking by the State the entire estate of a person for the benefit of the public, said:

"This would be laying a burden upon an individual which ought to be sustained by society at large. The English history does not furnish an instance of the kind. The Parliament, with all their boasted omnipotence never committed such an outrage on private property, and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind.

"The Legislature therefore had no authority to make an act divesting one citizen of his freehold without a full compensation [nor with it he afterwards holds]. It is inconsistent with the principles of reason, justice and moral rectitude. It is incompatible with the comfort, peace and happiness of mankind. It is contrary to the principles of social alliance in every free government, and lastly it is contrary to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.

" * * Singular indeed and untoward must be the state of things that would induce the legislature, supposing they had the power, to divest one individual of his landed estate, merely for the purpose of vesting it in another even upon full compensation.

"When the legislature undertakes to give away what is not their own; when they attempt to take the property of one man which he fairly acquired and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor. To construe it liberally would be sinning against the rights of private property.

*Griffin* v. *Mixon*, 38 Miss. 424, cited *supra*, decided in 1860, held that so much of an act of the Legislature of Mississippi as provided for a forfeiture of land to the State for failure of the owner to pay the taxes due thereon, was in violation of the 13th section of the Bill of Rights of that State, which prohibits the taking of private property without "just compensation being first made therefor," and also of the 10th section which declares that a citizen shall not be "deprived of his life, liberty or property but by due course of law," and was null and void.

Judge Harris makes an exhaustive review of the authorities, and renders an able opinion in the case. He says:

"The question involved is whether the legislature had power, by *simple act of legislation*, to vest the title to lands delinquent for non-payment of taxes in the state of Mississippi.

"Independent of written constitutions, as early as the seventeenth century, it was said by Lord Coke, when Chief Justice of the King's Bench, in Dr. Bonham's case, 'that the *common law* doth control acts of Parliament and adjudge them void when against common right and reason.' Lord Hobart a few years after in *Day* v. *Savage*, declares that an Act of Parliament made against natural equity (as to make a man judge in his own case) was void; and Lord Chief Justice Holt is reported to have said in relation to the declaration of Lord Coke, cited above, that it 'was not extravagant, but was a very reasonable and true saying.' *City of London* v. *Wood*, 12 Mod. 687, and 10 Mod. 118."

Quoting with approval many of the cases herein cited and others he concludes as follows:

"Regarding the act in question as an assumption of executive and judicial powers by the legislature, depriving the defendant of his property without 'due course of law' or without 'just compensation first made' by a simple act of legislation, without hearing, without inquiry, without notice, it is in my judgment, in violation of our organic law and therefor void."

*Norman* v. *Heist* 40 Am. Dec. 495:

"It was deemed necessary to insert a special provision in the constitution to enable them to take private property even for public use; but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit, for that, but because it was expected that no legislature would be so regardless of right, as to attempt it."

There can be no claim or pretense that the land taken by the State under Art. XIII of her constitution, is taken for a public purpose. The purpose is not declared by the Article, but sufficiently appears therefrom; for the purpose is to be determined,

not by any avowel, but by the destination of the property, and that, we have seen (sec. 3) becomes the property of one private person by operation of the same legislative act that takes it away from another, without compensation to the State, or idemnity to the person despoiled; and whatever advantage the State has been thought to derive from this exchange of proprietors, and which will be considered hereafter, it is plain that the person whose title to the land is thus unceremoniously transferred from him to another, can be no sharer in such advantages; and it was said by the court in *Staurt* v. *Palmer* 74 N. Y. 183, concerning the taking of land in street improvement proceedings:

"If the law should authorize such an assessment to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional, (citing many cases).

## FORFEITURE CANNOT BE ESTABLISHED COLLATERALLY.

*Fifth Specification of Error.*

There was in this case no pretense that a forfeiture of the land in question, for any cause, had ever been established or decreed in a direct proceeding on behalf of the State or of any person in any way; and if there could be a forfeiture, or any kind of defeasance under the said Article, the fact of such forfeiture must first have been established in a direct proceeding therefor, and could only be proven in this case by a proper and complete record, showing a decree or judgment of forfeiture. The attempt to show the probative facts and to adjudge a forfeiture, in an action for a different purpose, brought by the opposite party, is wholly inadmissible and is not supported by any legal principle nor by any authority that we have encountered; but the contrary has been held by implication in all cases herein cited and by some of them directly. It would be as proper, in this case, to probate a will in order to show an estate by devise; to cancel a conveyance for fraud in order to vest a title in one of the parties; to try and condemn a witness of an infamous crime in order to render him incompetent to testify; or to try a man for murder or other crime upon answer to a writ of *habeas corpus*, as to try and adjudge, in this action, the question of the alleged forfeiture.

A trial of the question involves a proceeding on suggestion of defendants and a defense to their effort to establish the forfeiture, if there can be any defense, and this action of ejectment is converted into a suit in chancery with the parties transposed; which is sufficient to demonstrate that the question cannot be litigated in this action.

Can there be any defense to the forfeiture, upon the facts, supposing it to be true that the owner had not, for the requisite period, for any reason whatever, been charged upon the land books with State tax on the land? If there can be, it is as competent to make the defense in this action as it is to attempt to establish a forfeiture, and to that defense the State or some one not party thereto, might be a necessary party. But, since we have seen that "public officers may connive with rogues to rob the citizen of his property," suppose plaintiff had offered to prove that two of the defendants were the county assessor and the clerk of the county court respectively, and the third was the agent of the land owner, charged with the care of the land and the payment of taxes and supplied with money therefor; that by collusion among them, the land had either been dropped from the land books, or the taxes not charged and extended against it; that the money to pay the taxes had been divided among the conspirators and false reports had been made to the owner; that the conspirators were claimants of the land under the colors of title mentioned in Sec. 3, and that the title to the land would be "transferred to and vested in" them upon the expiration of their five year conspiracy and fraud. The court below, to sustain the view that the title has vested in the State, must have rejected the offer on the ground that it was an attempt to divest the title of the State, and could only be done in a chancery suit therefor; or that there could be no defense. Clearly all evidence upon the subject of forfeiture would be incompetent except a decree of a competent court in due form, which could only be impeached by showing the law to be invalid, and the court below should have so held. But would not these facts defeat the forfeiture? If they would, it could be only because the owner had not been divested by "due process of law"; if they would not defeat the forfeiture, but the conspirators should acquire the title and be inviolable in their fraud, it would be because such taking by their fraud and conspiracy, would be due process of law—that "*Due Process*

*of Law*" that has been the boast of the Anglo-Saxon for centuries.

Suppose that instead of the *owner* being charged upon the land books with the taxes upon the land, the land and taxes are, for any reason whatever, charged to another, but the taxes are paid by the owner. Is the land nevertheless forfeited? The Article says so, and affords no one opportunity to controvert it, and does not contemplate the possibility of a defense.

What if by invasion or insurrection the county government should be suspended and no land books should or could be made out, and the owner of land should therefore not be charged on them with taxes on his land, would that be no defense? Would the land nevertheless be forfeited? What if the legislature should provide by law that non-resident land owners should return their land, and pay taxes, directly to the State auditor or treasurer or other State officer, as railroad companies do, upon pain of forfeiture, and that should be done; would the lands still be forfeited because not charged on the land books of the county? There would be the Constitutional provision, which the legislature cannot abolish. Are all the railroad lands in West Virginia forfeited? If there can be a defense to, or avoidance of, forfeiture on any grounds, the Article provides for and contemplates none and is void; for it must so provide. *Kuntz* v. *Sumpton*, 117 Ind. 1; *Stuart* v. *Palmer*, 74 N. Y. 183; *Boggs* v. *The Commonwealth*, 76 Va. 989; *Fisher* v. *McGirr*, 1, Grey 1; *Wong Wing* v. *United States*, 163 U. S. 228.

If, the land not being charged, no defense such as I have mentioned can be permitted to defeat or relieve from the forfeiture, then most clearly the Article is void, independently of the other grounds of invalidity. It is what may be done by the authority of a law, that is the test of its constitutional validity.

It has been attempted in numberless cases to prove in suits between corporations and individuals, violations of the terms and conditions of the charter or of the law relating to it, and to show a resulting forfeiture, to defeat the suit: and it has been invariably held that this cannot be done and that the only competent evidence to prove such forfeiture is the judgment of a court directly upon the point. Some of the many cases that so hold are: *Cleveland & Pittsburg R. R. Co.* v. *Speer*, 56 Pa. St. (94 Am. Dec. 84); *Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *Trustees Vernon Society* v. *Hill*, 6 Cowen, 23; *Regents University of Md.* v. *Williams*, 9 Gill & J., 365; *Conn. & Pass. River R. Rs.*

v. *Bailey*, 24 Vt. 465; *Brookville & Greenburg Turnpike Co.* v. *McCartley*, 8 Ind. 392; *Cahill* v. *Kalamazoo Mut. Ins. Co.* 5 Douglass (Mich.) 124 (43 Am. Dec. 457); *Irvin* v. *Lumberman's Bank*, 2 Watts & S. 203. Also, Angel and Ames on Corporations, 777.

The law laid down in these cases is well stated in *Irvin* v. *Lumberman's Bank*, *assumpsit* to recover amount due on notes, the defense, non compliance with the laws chartering and governing bank, and the consequent forfeiture of charter and disincorporation of bank.

"The Act of the 25th March declares the charter of a bank, neglecting to pay or declare dividends, absolutely null and void and of no effect whatever; and that the bank from thenceforth shall be deemed and taken as dissolved, unlawful and unincorporated. The 7th section of the Act incorporating the Lumberman's Bank, also declares that no discount shall be made, or any note issued by the bank until the whole of the capital stock shall be paid in. These prohibitions and restrictions are very positive and expressed in strong language; and if the bank has omitted or neglected to comply with them, and the proper steps had been taken, the charter would have been declared by the proper authority null and void. But, the difficulty that meets the defendants, is, that we cannot judicially know, nor can we now investigate the truth of these allegations; for if there be anything settled, beyond all cavil and controversy, it is, that the violation of a charter of incorporation cannot be made the subject of judicial investigation in a collateral suit. The only evidence competent to prove the forfeiture of a charter is the judgment of a court directly on that point."

There is no distinction in principle between the class of forfeitures last mentioned and forfeitures of titles to land, where there can be a forfeiture, and confiscations called forfeitures. Charters, like titles to land, are created by matter of record and can be divested or transferred only by matter of record.

A quite sufficient reason, and except the invalidity of the law no reason is more cogent, why forfeiture cannot be charged, enquired of and established collaterally and in a case like the one at bar, is that it is an assumption and exercise of criminal jurisdiction by a civil tribunal and in a civil action; for, give it whatever outward form and dress we may, the law by which the State undertakes to take away a man's property as the consequence, whether direct or remote and incidental, of any act or default of himself or of another, or of both jointly, is, in its essence, a criminal law, and must be enforced according to the practice, and under the rules of evidence, pertaining to criminal proceedings. *Cummings* v. *State of Missouri*, 4 Wall, 329. The defendants in this cause can lawfully claim no advantage that

would be denied the State, behind which they strive to shelter their tortious possession, if the State were prosecuting an action for the forfeiture.

In suits to recover forfeitures the rules in criminal cases apply and all facts material to sustain the suit, must be proved *beyond a reasonable doubt. Riker* v. *Hooper*, 35 Vt. 457 (82 Am. Dec. 646) and cases cited. The person against whom the forfeiture is to be enforced has the right to have the question tried under that rule, by a jury who shall render their verdict under the instructions, and not by the *direction*, of the court.

If the forfeiture is a punishment, and is meant as such, as was said by this Court in *Cummings* v. *Missouri* and *Ex parte Garland*, then that for which the punishment is inflicted must be *crime*, and a most grievous one in the present case, if its magnitude is measured by the penalty. Picture, then, this plaintiff in error upon trial for a crime not imputed to him but to some other, for which neither he nor that other have been arraigned or accused, for which the certain penalty is some hundreds of thousands of dollars, to be exacted from this plaintiff in error who is confessedly innocent of any wrong; then picture the Court, upon an unauthorized, *ex parte* certificate of one officer, and an unauthorized, *ex parte* report of another, directing the jury to convict, and we have before us what occurred, in substance and effect, upon the trial of this cause in the court below.

In *Riker* v. *Hooper*, *supra*, defendant had sued plaintiff in trover for an impounded horse and had suffered judgment, the important question being as to notice of impounding. Plaintiff then brings this action to recover the forfeiture, and offers in evidence the judgment in trover, which was admitted in the court below. In holding such action to be error, the Supreme Court of Vermont says:

> "All who are conversant with courts must have observed that juries will render verdicts in civil cases upon slight evidence—the mere balance of probabilities, when in criminal cases nothing would induce them so to decide. The law justifies them in so doing. The distinction is an important one and leads to widely different results. To admit the judgment in trover as conclusive here, might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to this case. But we do not think it admissible even as *prima facia* evidence of the legality of the notice.

If conclusive argument upon this question is needed, it is found in the following from the opinion of *Gaines* v. *Buford*, *supra*.

"It is not a satisfactory answer to these suggestions that the question of forfeiture is adjudicated upon by a court of justice, and that Gaines has had a public trial, before a jury, in this action of ejectment. He was there defending no plaint of the commonwealth; there was no accusation against him at the instance of the commonwealth, of which he was notified, and called upon to defend; nor was the jury sworn to try an issue between them. It was no prosecution, "carried on in the name and by the authority of the Commonwealth of Kentucky." The question of forfeiture and divestiture of the title came up collaterally only. It was used as a part of the defendant's case, to show that the plaintiff's title had, therefore, before the institution of the suit, passed from him and vested in the commonwealth. The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divestiture of title which had theretofore taken place. The Court and jury were not a means for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the 2nd of August, 1825, long before this trial, or it is still in him."

*Some Similar Cases.*

*Marshall* v. *McDaniel*, 12 Bush. 378 (Ky. 1876).

Was a case similar to the one at bar, and the greatest part of the opinion delivered by Chief Justice Lindsay is as follows:

"By section 5 of an act approved Dec. 19th, 1801 (2 Statute laws, page 1072), it was provided that 'Any person (infants and persons *non compos mentis* excepted) claiming lands in this state and failing to list the same for taxation, in case of a resident when legally called on by a commissioner of tax, and in the case of a non-resident, with the auditor on or before the first day of October next, shall for and in consequence of such failure, forfeit his or her claim, to the commonwealth.'

"In the construction of this act it was held by this court that the failure by claimants of lands to comply with its provision did not *ipso facto* divest them of title and vest it in the commonwealth, but that in each case an inquest of office found was essential to make complete and effectual the forfeiture.

"But, afterward, on the 12th of January, 1825, it was enacted 'that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the State, the title of such lands shall vest in the commonwealth by virtue of this act without any inquest of office found, unless said lands shall have been redeemed according to law." (2 Stat. Laws, page 1079)

"Appellants do not claim that the lands covered by the patent to Bush and Thompson were ever stricken off to the State, nor that the supposed forfeiture has at any time been perfected by a proceeding made a matter of record. But, upon proof of the fact that the public records fail to show that for certain years whilst the act of 1825 was in force, and before appellee claims to have acquired title, Bush & Thompson failed to list the lands for taxation, they insisted the title was forfeited to the commonwealth and

that the lands were therefore subject to entry, under the provisions of the act of March 2nd, 1860.

"Conceding that the proof shows *prima facie* the lands were not listed for taxation and that the failure to list falls within the scope of the act of 1825, we will proceed to inquire whether it was within the power of the legislature to provide for the infliction of such a penalty without an inquest of office found? * * *

"Self enforcing penal statutes are repugnant to the plainest principles of justice, and are utterly inconsistent with the fundamental maxims of a government in which the judicial power is vested in a department separate from and independent of the law-making power.

" 'To enjoin what shall be done or what left undone and to secure obedience to the injunction by prescribing appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction, and inflict the penalty, belongs to the judicial function.' (*Gaines* v. *Buford*, 1 Dana, 481).

"By the Magna Charta it is declared that no citizen shall be disseized of freehold or be condemned, but by the lawful judgment of his peers or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defense.

"As said by this Court in the case of *Page* v. *Hardin*, (8 B. Monroe, 672), 'we shall not argue to prove that in a government of laws a conviction whereby an individual may be deprived of valuable rights, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment with opportunity of defense and proof.'

"Bush & Thompson were at no time arraigned for failing to list their land for taxation. They had no opportunity to be heard or to make defense, and yet the appellants, in a contest with the vendees of Bush & Thompson, are asking the courts to try the question of their guilt, and to adjudge that more than forty years ago the patentees neglected to perform a public duty, and thereby forfeited to the commonwealth their title to the land in controversy."

"It may be that the act of 1825 was intended to confer power upon the courts in determining the rights of individual litigants to enter into collateral inquiries of this nature; and in the case of *Robinson* v. *Huff & Wittaker* (3 Littell, 38 ) it is intimated in a dictum that the legislature had the power to take and pass the title to real estate without inquest of office, and therefore to authorize the trial of a man's guilt, and the infliction of the prescribed penalty in another than a direct proceeding against him. This conclusion seems to have been based upon the idea that the right of the citizen depends alone upon the common-law rule that no freehold may be given to the king, nor derived from him, but by matter of record, and that this common law is within the legislative control. But when it is attempted to pass title to the commonwealth and to forfeit the citizens property by way of punishing him for failing or neglecting to perform a public duty, his right to be heard in his own defense does not depend upon the rules of the common law; it is secured to him by the constitution. (*Gaines*. &c. v. *Buford*, 1 Dana, 481; *Page* v. *Hardin*, 8 B. Mon. 672; *Commonwealth* v. *Jones*, 10 Bush., 725; *Burkett* v. *McCarty*, 10 Bush, 758; *Griffin* v. *Mixon*, 38 Miss. 424.)

"We conclude without hesitation that so much of the act of 1825 as pro-

vided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the commonwealth, is unconstitutional and void.

"To deny to the legislature the power to work forfeitures for the non-listing of property for taxation, by the mere inherent force of the legislative enactment, is not to question its rights to provide that without judicial proceedings it may cause property to be assessed, taxes to be levied, tax precepts to be issued, and the tax payers property to be seized and sold for the purpose of enforcing collections. * * * *

"But when the commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to a citizen the right to be heard before his freehold shall be seized or he be condemned, and to be proceeded against in accordance with "the law of the land," applies, and the courts cannot, in deference to the legislative department of the government, hesitate to vindicate the constitutional rights of the individual."

The doctrine of the above case has lately been reaffirmed in the Supreme Court of Kentucky, in *Packard* v. *Beaver Valley Land & Mining Co.*, 96 Ky. 249 (1894,) the syllabus of which is as follows:

"So much of Sec. 1, Art. 16, Chap. 92, of General Statutes, (old edition) as declares that the failure of a non-resident to list his lands for taxation within the length of time therein fixed, shall operate as a forfeiture of his lands to the Commonwealth without judicial or other proceedings to declare the forfeiture, is unconstitutional and void."

And this was for a *failure by the owner* to list—not a failure by *the State* to charge taxes, or "when the owner shall not have been charged."

*Gaines* v. *Buford.*

Referred to in *Marshall* v. *McDonald*, *supra*, decided in 1833, holds invalid a statute of Kentucky, requiring owners of certain lands, to improve a certain portion thereof, and prescribing forfeiture of the lands for failure to improve. The case contains a learned and able discussion of many of the objections that are here urged against forfeiture.

*State* v. *Heman* 70 Mo. 441. (1879)

Sec. 116 of Act of 1865, is as follows:

"Every tract or town lot offered for sale by the collector, as hereinafter provided and not sold for want of bidders, shall be and the same is hereby declared forfeited to the State of Missouri, and thenceforth all right, title and interest of every person whomsoever, in and to such land or lot shall be considered as transferred to and vested absolutely in the State, and such

real estate shall not afterwards in any case be subjebt to taxation and sale as other lands, except as hereinafter provided until again sold to some person by the State or redeemed."

Sec. 117 provided for redemption within two years by payment of double the amount for which the land was forfeited, all taxes accruing thereon prior to the redemption with 15 per cent. interest, &c.

The court held that Sec. 116 of said act did not vest in the State an absolute title to the land struck off to the State, but only gave a lien for the taxes.

*Scharf, Commissioner of the Land Office* v. *Tasker*, 73 Md. 380, (1891.)

In delivering the opinion of the court, Judge McSherry, says:

"During the January session of 1890, the General Assembly passed an act entitled, 'An act to provide for the assessment of the unclaimed military lots and tracts of land in Allegheny and Garrett counties, and for the collection of State and county taxes thereon, by selling the delinquent lands, and turning the net proceeds into the State Treasury.' By the first section, after directing that public notice should be given, warning the owners of unassessed military lots, lying in the two counties named, to establish their title thereto on or before the first day of April, 1891, it was provided that upon failure of the owners to comply, 'all their rights shall be forfeited to the State.' * * * * * *

"The first section of the act of 1890 is palpably in conflict with the organic law of the land. After the close of the Revolutionary War, the State of Maryland divided large tracts of land lying west of Fort Cumberland, into lots of fifty acres each, and allotted to every commissioned officer of the Maryland Line, four, and to every private soldier, one of those lots which are now known as 'military lots.'

"Owing to lapse of time, and other causes, the present owners of many of these military lots, are unknown, and the object of the First section of the act of 1890, was to compel these unknown owners, to establish their title, so that the property might be placed upon the assessment books of Allegheny and Garrett counties. But the legislature exceeded the limits of its authority, when it undertook in the same section, to *forfeit* the property, the title and estate, of all unknown owners upon their failure to produce, within the time designated, the evidence of their title. It needs no argument and no citation of authority, to show that the title of the unknown owners, of these lots, cannot be forfeited without due process of law; and that such legislation as this, is far from having even the semblance of due process of law.

"Whilst it might not be inappropriate to comment upon, or to criticise, the questionable propriety of this fruitless effort to confiscate the property which the State, more than one hundred years ago, in a spirit of gratitude, voluntarily donated to the heroic men, who fought with such signal and such distinguished courage, in the protracted struggle for our independence, we should perform our duty but imperfectly if we hesitated to

declare with unequivocal emphasis, that this feature of the Act is plainly in contravention of the twenty-third Article of the Declaration of Rights."

Here is no question about inquest of office or other proceeding to effect or establish or prove a forfeiture. The court goes to the bottom of illegality and tears it out by the root, by holding that the legislature had exceeded its power. The court calls it by its right name—confiscation.

*Eastern Land, Lumber and Manufacturing Co.* v. *State Board of Education*, 101 N. C. 35, (7 S. E. 573) (1888).

The case arose under the Chap. 36, Laws of 1842-3, which provides as follows:

"That any person or persons having heretofore at any time obtained a grant or grants from the State for any swamp lands, and who, or their heirs or assigns, have not regularly listed the same for taxation and paid the taxes thereon to the person or persons entitled to recieve the same, such person or persons so having obtained such grant or grants, their heirs or assigns *shall forfeit* and lose all right, title and interest in the said swamp land, and the same shall, *ipso facto*, revert to and be vested in the State, unless such person or persons, his heir or their heirs or assigns shall, within twelve months from the passage of this act pay to the sheriff of the county in which said lands lie all the arrearages of taxes due on said lands with the lawful interest thereon from the time said taxes ought to have been paid."

The land in controversy, part of a grant of 90,000 acres made in 1795, was "swamp land," and was unoccupied and not listed for taxation from 1806 to 1873, in which year purchasers from the heirs of the patentee went into possession and began listing and paying taxes on the land, but no arrearages of taxes was paid. In 1887 the Board of Education went upon the land and surveyed out the boundaries, claiming the land as forfeited to the State under the act of 1842-3, the second section of which vested the title to lands so forfeited in President and Director of the Literary Fund under which said Board claimed.

Plaintiff brought civil action under the Code to restrain defendants from expelling plaintiff, and to quiet plaintiff's title. Decree for plaintiff, and defendant Board of Education appealed.

The court says:

"The strong presumption is that the statute harmonizes with the constitution and is valid; but we are not called upon to decide whether it is or is not so, because this court interpreted it in *Phelps* v. *Chesson*, 12 Ired. 198,

and expressly decided that inasmuch as neither the State nor its assigns (the immediate predecessor corporation of the defendant appellant) had taken any proceedings, or in any way signified an election to defeat the estate of the alleged defaulting party, it was still in him, and he was entitled to maintain his action.

"Counsel for appellant seemed to question the correctness of this interpretation. We think it is reasonable and just, and it seems to us fully warranted, certainly by the spirit and reason of the statute. It is not to be presumed or merely inferred that the legislature intended to deprive the grantee of his estate without affording him opportunity, in some affirmative way, that actively puts him on notice to defend his right, if he shall see fit, and an intention to do so could only appear by clear and explicit terms, leaving no doubt as to such intent, and we forbear to say here whether such an enactment would or would not be of force for any purpose. The reasonable inference is that the legislature intended to allow such opportunity and it sufficiently appears that it has done so. * * * * Moreover, it is not declared in the statute that the land shall at once be *forfeited* to the State on such failure to list the land for taxation and to pay the taxes due on account of it or at the end of twelve months."

It is to be observed that in the case at bar, no action of any kind has been taken by the State, concerning the forfeiture, if such be needful.

*Phelps* v. *Chesson*, above referred to, arose upon the same statute of 1842-3.

The court says:

The defense relied on this, that the title of the plaintiff, * * * has been divested by the Act of 1842, Ch. 36, sec. 1.

To this the plaintiff replies: First, supposing the Act of 1842 to be constitutional, no proceeding had been taken, nor had the president and directors of the Literary Fund in any way made an election to divest the plaintiff's title by force of this statute. Second, the statute is unconstitutional.

Our opinion being very clear with the plaintiff upon the first point, we shall not enter into a consideration of the second, for the reason that we deem it disrespectful to the legislative branch of the government to call in question the constitutionality of the statute, unless the decision of the cause makes it necessary to do so. * * * Admit that this act has the force of inserting in the original grant a condition, that, if the taxes are not paid when due, but shall at any time be in arrears, 'the land shall *ipso facto* revert to and be vested in the State;' according to the well settled principles of law, if the taxes were in arrear at any time, the estate created by the grant would not be defeated and revert to the grantor, unless some solemn act was done by which to enforce the condition, for the estate having commenced by a solemn act, viz: *A grant* must be defeated by an act equally solemn, upon the maxim of the common law, '*eo ligamine quo ligatur.*

If a feudal tenant failed to perform the services, his estate was not defeated until the lord had judgment in a writ of cessavit. If a subject incurs

a forfeiture by committing treason, his estate is not defeated until "office found." If a feoffment is made on condition, and the condition be broken, the estate continues until it is defeated by the entry of feoffor or his heirs. Coke on Lit., chapter on Conditions.

The law books teem with cases fixing the principle, that an estate once vested cannot be defeated by a condition or forfeiture, without some act on the part of the grantor or his heirs, by which to take advantage of the condition or forfeiture, even when the words of the conditions are the estate shall therefore be void and of no effect, which words have the same legal effect as *ipso facto* void.

The court carefully forbears in both the above cases to express an opinion upon the constitutionality of the statute, but it is plain to be seen what its opinion would be if the decision of the case required its expression. The words "by operation of law" certainly have no greater force than the words "*ipso facto* revert to and be vested," and leave quite as much room for the interpretation that something in the nature of an *inquest of office* or direct adjudication, upon notice and hearing, in a proceeding for the purpose between the parties, is essential to a divesting of the "forfeited" title.

In this connection it may be proper to refer to the provisions of the West Virginia statute requiring reports and records to be made by various officers, and particularly by the Auditor in pursuance of the forfeiture, to be noticed hereinafter, and to insist they must affirmatively appear to have been made, and that not having been made, the forfeiture, even according to the terms of Article XIII, is incomplete and ineffectual to divest title.

*Hoke* v. *Henderson*, Devereux's Law 1; declared a statute of North Carolina, which attempted to transfer an estate in an office from one person to another, unconstitutional and void, and we quote from the able and elaborate opinion of Chief Justice Ruffin in that case. The act did not apply to particular persons by name, but provided for elections to fill certain offices then filled by appointment "during good behavior."

"The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the government to abolish the right, or which restrains the govern-

ment from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present constitution it was asserted by our ancestors on various occasions; and, in one sense of it, its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen against the claims of unrestricted power in the government was conspicuously felt, the people formed the constitution of this State; and therein declared "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land."—(Bill of Rights, s. 10). By the fourth section it is declared, "that the legislative, executive and supreme judicial powers of government ought to be forever separate, and distinct from each other."

In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant; because that body in which resides the superior authority can, at will, make it supreme and absorb all the other departments. It does not follow, therefore, that because the British parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate when it professes to enact new laws. That faculty is expressly denied to our legislature, as much as legislation is denied to our judiciary. Whenever an act of the assembly, therefore, is a decision of titles between individuals or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right; which is not a legislative but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think, that where a right of property is acknowledged to have been in one person at one sime, and is held to cease in him and exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*.

* * * * * * * * * *

"The question is not now upon the validity of the title under the new elections to the office, if vacant, or when it shall in future, become so; but upon the right claimed under it to immediate induction, notwithstanding the office is already full by a previous legal appointment of another person. To sustain this claim the previous appointment must be vacated or the officer adjudged out. When the act proceeds to do this, it becomes, in that respect, an adjudication. Although it is not purely so in all its provisions, and may not in any be conclusively and definitively so, because it does not decide *inter partes* by name; yet it partakes of that nature, for the reasons already stated, and the prohibition of the constitution is as imperative against the assumption of the judicial power by the legislature in combination with their legislative authority, as if the act were a single and simple one of direct adjudication. Creating a right, or conferring it on

one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without default*, is equally so and still more indefensible. The legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land*, by which alone a freeman can be *deprived* of his *property*.

Those terms "law of the land" do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizens suffer, than to be "taken, imprisoned, desseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer, if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons be in itself, a law of the land within the sense of the constitution; for what is in that sense, the law of the land, must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land," for those purposes. Although in some instances the principle may have been misapplied, yet it seems, in every case in which it hath come into discussion, to be admitted to be a sound one, and the true import of the constitution,"

*Statutes that operate Against Principles of Common Right and Common Justice, Are Void.*

It is true that universal consent has not been yielded to this proposition, and that it is not without its able opponents; but the doctrine is ably sustained by many of the cases above cited, and in this country, when we observe that one of the announced purposes of the Constitution of the United States is "to establish Justice", it must be held, that any attempt by a State to drag her from her throne, most surely violates the Constitution and is illegal and ineffectual, and this Court is well warranted in saying that "there are limitations on legislative power which grow out of the essential nature of all free government." *Loan Assoc.* v. *Topeka* 87 U. S. 655.

There may be further cited, *Flint River Steamboat Co.* v. *Rob-*

*erts*, 48 Am. Dec. 178; *Ham* v. *McClaws*, 1 Bay. 93. *Morrison* v. *Barksdale*, 1 Harp. 101. The statute under consideration is a typical one of that sort, applied to and viewed in the light of the present case. If an act providing for the rendering of judgment without notice, is unjust and void, (*Steamboat Co.* v. *Roberts*, *Supra*) one that disposes of private property without judgment and without notice, surely is not just or valid.

## THERE WAS NO COMPETENT EVIDENCE OF FORFEITURE.

*First, Second, Third, Fourth and Tenth Specifications of error,*

A certificate of the auditor is admissible in evidence only for the purposes, and under the conditions, mentioned in the Code, and only by virtue thereof.

Chap, 130, sec. 5, provides as follows:

> The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands or of their not having been entered on the books of the assessor of the county or counties wherein the same were chargeable with taxes, shall, in any suit in relation to such lands, be prima facie evidence of what is stated in such certificate, provided it be filed with the papers of said suit and notice thereof be given to the opposite party or his attorney at least twenty days before the first day of the term at which it is to be offered as evidence. When the certificate purports to be signed by the said auditor, it may be admitted as evidence without proof of his signature.

A certificate under this provision can be used to prove that taxes have or have not at any time been paid on "*forfeited or delinquent lands*" and the time of such payment, or the fact of "their (such forfeited or delinquent lands) not having been entered on the books" &c—nothing more.

Lands *must be shown* to be "forfeited or delinquent" before the certificate can be used. Such certificate does not testify to the forfeiture or delinquency, it assumes it, and cannot be offered to prove it.

The certificate offered by defendants does not come under this provision at all, nor purport to certify a single thing that the auditor is authorized to certify, and is utterly incompetent to prove, or to be offered in evidence of, a single alleged fact stated in it. It does not purport to say that the lands mentioned in it are "forfeited or delinquent lands" and no evidence that they were, had been offered. The facts stated in it, if true,

would not, as has been shown, have been provable in the case by any evidence and would not constitute forfeiture, if they were proved. If free from all other objections, and admissible for any purpose, it would be but secondary evidence of what should be proved, if at all, by a judgment or decree of forfeiture, or at least by a transcript from the record that is made by statute *prima facie* evidence of forfeiture. No such evidence was offered or its former existence and loss shown.

The statute is in derogation of the common-law, and before a mere *exparte* certificate of a fact, of which, if it exists, there must be other and better evidence, can be used, the certificate must be authorized by the statute. Forfeitures are not to be established by doubtful evidence.

Chapter XXXI, sec. 39, Code of W. Va. provides:

"A record of all real estate so forfeited which shall come to the knowledge of the auditor shall be kept in his office, in which shall be shown the name of some former owner or supposed owner, the quantity or supposed quantity, and local or other description of the real estate, for what years the owner was not charged with taxes, and when the real estate became forfeited. Such record shall be *prima facie* evidence that the owner was not, for such years, charged with the taxes on such real estate, and that he did not cause it to be entered and charged with such taxes as aforesaid, and that the real estate was forfeited and vested in the State at the time specified."

It is from this record that the certificate of the auditor, in proof of the fact that there was no forfeiture, was presented by plaintiff. The certificate offered by defendants is wholly incompetent and inadmissible for any purpose.

The reports of the Commissioner of school land for Wyoming and Logan counties (pp. 16-19,) two only of the four counties in which the land lies, are inadmissible for any purpose whatever. They would be evidence only that such reports had been made, if that were material, but not of the alleged facts contained in them. They are but preliminary to other proceedings, which do not appear to have followed—from which fact the inference may be drawn, if any may, that the lands were not forfeited, or in any way liable to sale. Nothing follows the report of Senter, made a year before this action was brought, and the report of Buskirk, made three and a half years before this suit, terminates with an order made the day the report was filed, that suit be

brought and prosecuted for the sale of the lands reported. These reports do not help the auditor's certificate and are not helped by it. The reports purport to be made under Chap. CV sec. 5 of the Code of West Virginia, which section, so far as it relates to the making of reports, is as follows:

> It shall be the duty of the commissioner of school lands of each county to report to the circuit court of his county, once in each year, a list of all tracts and parcels of land, if any, in whole or in part within his county, not reported to the clerk of the circuit court under sections one and two of this chapter, which in his opinion are liable to be sold for the benefit of the school fund as well as those which have been so reported to said clerk.

The remainder of the section relates to the institution of suit to sell the land.

Sections one and two of said chapter are as follows:

> 1. "All waste and unappropriated lands within the State, and all lands in this State heretofore vested in the State of Virginia by escheat, forfeiture or purchase at sheriff's or collector's sale for delinquent taxes, and not released and exonorated or redeemed within one year according to law; all lands heretofore or hereafter purchased for this state, at a sale thereof for taxes, and not redeemed within one year, according to law; and all lands forfeited to this state for the failure to have the same entered upon the land books of the proper county, and charged with the taxes thereon as provided for by law; shall, so far as the title thereof shall not be vested in junior grantees or claimants under the provisions of the Constitution and laws of this state, be sold for the benefit of the school fund, in the manner hereinafter prescribed. The auditor shall certify to the clerk of the Circuit Court a list of all such lands, which in whole or in part lie in this county, within sixty days after the title thereto shall vest in the state."
>
> 2. "It shall be the duty of the surveyor of each county in this state, as soon as the same shall come to his knowledge, to report to the circuit court all waste and unappropriated lands in his county, except the lands under the bed of the Ohio river, subject to sale under the provisions of this chapter, designating particularly the quantity of the tract or parcel, and the local situation thereo, together with all information he can procure in relation to the same, and of any claim of title thereto."

It will be seen (sec. 5) that what the commissioner is required to report to the clerk of the circuit court is, "a list of *all* tracts and parcels of land *not* reported to the clerk of the circuit court under sections 1 and 2, which in his opinion are liable to be sold." The expression that follows qualifies "liable to be sold" and not the commissioner's duty to report. This is obvious from the uselessness of his reporting things not reported to him or peculiarly in his knowledge, and which had already been reported to the clerk by the state auditor, and county surveyor.

The report of Buskirk (p. 19) embraces a list of lands "that *have* heretofore been reported," for which report there is no authority, and that portion of the report which includes the land in controversy, purports to be "List of said Lands," &c., and not "a list of *all* tracts and parcels of land." It does not appear whether the lands in this list, or any of them, lie in whole or in part in said county, and some tracts appear in both lists. It is at most the "opinion" of the commissioner that the lands are liable to be sold. His opinion will not be seriously urged to be evidence of the fact; and his designation of the lands as forfeited is entirely unauthorized. The commissioner is authorized only to report lands "which in his opinion are liable to be sold for the benefit of the school fund" not reported under sections 1 and 2, and he has no authority to classify them. That is for the court, at some proper time. It involves conclusions which he is not authorized or permitted to make The land mentioned in sections 1 and 2 are such as are waste and unappropriated, or have been forfeited, escheated to, or purchased by, this state or the state of Virginia, and differentiation is certainly not for the commissioner of school lands. He may report any thing that "in his opinion is liable to be sold," but is not authorized or required to describe it as forfeited, escheated or otherwise, and cannot determine its character. Any designation of land by him, as forfeited, is no evidence that it is forfeited.

Neither the reports nor the order of court directing suit to be brought, were made in any proceeding to which either plaintiff or any one under whom he claims, was a party, but said reports and order were of an *exparte* and administrative character. The order is not an adjudication of anything, but is merely a direction to bring suit. The Court has no authority to order the suit to *sell* the land, as it is not shown to be liable to sale, which is a jurisdictional prerequisite in such a special proceeding. Under the Virginia Act of March 30th, 1837, providing for the sale of all lands then forfeited to that state, and for the appointment of commissioners of forfeited and delinquent lands, who were required to ascertain and report to the court all the "forfeited and delinquent" lands of their counties, to be sold by decree of the court, it was held in *Twiggs* v. *Chevallie*, 4 W. Va. 463, that the court had but a limited jurisdiction and "could only adjudicate upon land *actually* forfeited and none other." Until then, the lands in the reports of Buskirk and Senter are shown to be forfeited, the court appears to have been without jurisdiction, and these

reports cannot be used to prove what is necessary to their introduction as evidence. The documents prove nothing, and tend to prove nothing, either by themselves or in connection with the auditor's certificate, except that the defendants felt the certificate proved nothing by itself and needed fortifying. The report of Baskirk puts the land in question in list of lands "forfeited for non-entry for five successive years since 1869," (p. 25) and appears to put the entire tracts in Logan county. There is no forfeiture for "non-entry," as I have shown, and the report of Senter (p. 17) puts the most of it in Virginia and Kentucky, and shows that all taxes were paid prior to and including the year 1883. The want of trustworthiness of these documents is apparent, if nothing else appears. Nothing at all is brought forward from Mingo and McDowell counties, and nothing definitely shows that there is 1000 acres of the land in the state.

It may be objected that this court will not upon writ of error, inquire into the sufficiency of the evidence offered in the court below, but will only examine its admissibility. This I understand to be the general rule, where the verdict is rendered by a jury upon the evidence, but I cannot conceive that it has any proper application to a case where this court reviews not the action of the jury but of the court, and it would certainly seem competent for this court with all the evidence before it, which was before the court below, to determine whether the court below, in directing verdict for either party, was warranted by the evidence in so doing, and exercised proper judicial discretion, and that if this court should be of opinion that such action was not warranted by the evidence, even if properly admitted, it would reverse the judgment.

Plaintiff's title is a "private right and interest in land derived from or under the laws of the state of Virginia * * * and shall remain valid and secure and shall be determined by the laws in force in Virginia prior to the formation of this state of West Virginia.

So declare the very first words of this Article upon forfeiture, and it means that such "private right or interest in land" shall not be confiscated by the state of West Virginia, for a cause or upon occasion for which it could not have been confiscated under the laws of Virginia when the state of West Virginia was formed, or it means nothing at all. It was put as a preface to this

forfeiture Article as a guarantee against the forfeitures to be provided, for Virginia had had no forfeiture laws for years prior to the time of the separation, and never had any like those of West Virginia; and there could be no purpose in putting this saving provision into such a piece of piratical legislation as follows it, unless it was to preserve the interests specified from the general massacre about to follow, if it means nothing, why is it posted over the gate to this temple of despair?

The provision has not received any definite judicial interpretation.

*Seventh, Eighth, Eleventh and Twelfth Specifications of Error.*

Not only was no evidence of forfeiture shown by defendants, but plaintiff produces explicit evidence to the contrary by proof of payment, by his predecessor in title, of all taxes prior to and including the year 1883, and proof that the land had not since that time been entered in the record of forfeited lands, which the Auditor is required by law to keep, (p. 30), and which is the only evidence of forfeiture, and which is the only evidence, except a proper decree of forfeiture, competent to be offered, if indeed such a decree would be competent. This certificate ought to rebut any *suspicion* of forfeiture that might exist, if the forfeiture law were valid.

In addition to defendant 's failure to prove forfeiture and plaintiff 's evidence to the contrary, it is conceded that plaintiff had no knowledge of the pretended forfeiture or of any facts upon which a forfeiture could be predicated, and no notice thereof, unless the land books were such notice, and that he was a purchaser for value.

At the time of the alleged forfeiture, the title was in Randall, trustee. There is no pretense that plaintiff ever saw the land books and the court below expressed no opinion whether or not they afford *notice*. They certainly do not furnish notice, either of what they do or do not contain, and no competent evidence was furnished upon the trial of what they show. There is no law that makes them notice, and nothing was shown as to whether they were "duly kept" and nothing referred to of any other record that might be notice; and it is in evidence (Auditor's certificate p 30,) that in the place where records of delinquent lands and forfeited lands of every county in the State, brought together in one office, are kept, there was nothing to show any claim

of any kind of the State or of any other person through forfeiture. The law has for years required this record to be kept, and makes it *prima facie* evidence that the lands therein are forfeited, and upon that record and there alone would one look to see if there were any forfeiture of the land, the purchase of which he had in contemplation; and knowing that the clerks of the county courts, who are the custodians and the makers of the land books and of all the county records, are required to report to the auditor all the facts from which the auditor's record of forfeited lands are compiled, such purchaser would rely, and be warranted in relying, upon such record. And the State is clearly bound and estopped to deny the correctness of the record and to claim a forfeiture which that record does not disclose or suggest; and when the State is estopped all the world is estopped.

It will doubtless be contended by defendants in error, that inasmuch as the statute (Chap. XXXI, sec. 39, Code W. Va.) requires only that a record of such forfeited lands as "shall come to the knowledge of the auditor shall be kept by him in his office" &c., a person cannot rely upon that record for information in a contemplated purchase or incumbrance of land, or for any purpose, but is bound by the fact, although, through the fault of the States' agents, no record or other evidence thereof exists. To sustain such contention is to destroy the entire value of a public record, and defeat the purpose of a law, designed for the protection of the investor and the citizen. It would "keep the word of promise to the ear, but break it to the hope." One may well scrutinize the land laws of West Virginia for pitfalls and hidden meaning, but legerdemain of that sort is not to be expected or tolerated. Ample provision is made by law to bring all forfeited lands, if there be such, to the knowledge of the auditor, through the reports of the compilers and custodians of the land books and other public records; and if those officers whose paid and sworn duty it is to inform him, fail to bring the matter before the auditor, how is a stranger to acquire such knowledge, and by what principle of law or equity concerning forfeitures, shall the State take advantage of her own wrong or another be permitted to do so? The contention is puerile.

It may be proper to observe at this point, that, in addition to the fact that a forfeiture must be proven and established under the rule of evidence in criminal cases, when the defense is an outstanding title, that title must be a valid and subsisting one at

the time of trial, and must be proven *beyond all controversy. Greenleaf's Lessee* v. *Birth*, 6 Pet 302; *Leesee of Griffith* v. *Bradshaw*, 4 W. C. C. 171; *Foster* v. *Joice*, 3 W. C. C. 498; *Ryan* v. *U. S.* 136 U. S. 68; *Reusens* v. *Lawson*, 91 Va. 226.

It has been held by the court below that when the sheriff sold a tract of land for taxes and did not *report* the sale within ten days thereafter, as required by law, the owner has a right to assume that no sale had been made, by which his title was divested, and to rest upon his legal rights. *Wakeman* v. *Thompson*, Appendix to 32 W. Va.

Chap. CV, 1, Code of West Virginia given above provides that all waste and unappropriated land, and all land purchased by the State and not redeemed and all forfeited land shall, except such as are invested in junior claimants under the provisions of the Constitution and laws of the State, be sold for the benefit of the School fund by proceedings brought in the Circuit court, and further provides:

> The Auditor shall certify to the Clerk of the Circuit court a list of *all such lands* which in whole or in part lie in his county, *within sixty days after the title thereto shall vest in the State.*

No such report of the land in question has ever been made at any time. The requirement is mandatory and unqualified, and applied to *all* lands, not such as may "come to his knowledge." If the land was forfeited at any time the defendants contend it was, and the law had been complied with, it would have been sold by the State before plaintiff ever heard of it. Can defendants shield their trespass and take shelter under the State by whose fault and by whose officers' negligence, or fraud, plaintiff is brought into his present situation?

If the State had purchased this land from plaintiff's grantor and had failed to record its deed or make any public record of the transaction, and plaintiff had subsequently purchased for value and in good faith, no one will contend that plaintiff would not be protected in his purchase. What force or dignity or inviolability is there about a conveyance by *forfeiture* not possessed by a solemn grant under hand and seal?

*Eastern Land & Manufacturing Co.* v. *State Board of Education*, 101 N. C. 46 has this to say upon a similar question:

> It will be observed the forfeiture is limited and extends only to his heirs and assigns, it does not embrace the purchasers of the land from them, *bona*

*fide*. It is not declared that the latter shall forfeit the land for the default of the former, nor that the lands shall be forfeited for such default while the title thereto is in an innocent purchaser, nor can the court *infer* that the legislature so intended * * * . It would be unreasonable and unjust to make the forfeiture apply to the land when and after the title thereto had passed to innocent purchasers.

The agencies of the State failed to comply with the requirements of the statute [to survey or take possession] in apt time, that is, within the time prescribed by law and while the title to the land remained in the grantee and his heirs. As they failed to do so, neither the statute nor the State will allow them, after the lapse of so many years, to disturb the rights of innocent purchasers.

See also *Fletcher* v. *Peck*, 6 Cranch. 122-3-9; *The Banks* v. *Poitiaux*, 3 Rand. 146.

Without conceding that defendants exhibited any competent evidence tending to show that plaintiff's land was forfeited, and proof of forfeiture must be strict and unequivocal, or that the documents received had that tendency, or that such proof could be received in the case: and without yielding to the forfeiture provision a spark of force or validity under any circumstances or for any purpose, it was manifestly error for the court to direct a verdict against plaintiff, an innocent purchaser, no matter what might be the proof or fact of forfeiture.

From the foregoing discussion it is manifest that the instruction of the court below was unauthorized by the facts or the law, and it being admitted that plaintiff had title, except for forfeiture, and that defense failing, the verdict and judgment should have been for the plaintiff.

In the investigation of authorities bearing upon the main question before us, I have found nothing to sustain the position of defendants, and in making this statement I do not overlook *Staats* v. *Board*, 10 Gratt. 400. *Wild* v. *Serpell*, *Id.* 405; *Hale* v. *Branscomb*, *Id.* 418; *Smith* v. *Chapman*, *Id.* 445, upon the Virginia Statute of 1835, and which hold the act to be valid. These cases were all decided practically at the same time and stand as one decision. They are not supported by any principle or authority, or justified by any reason, and none is attempted by the court. They have found few apologists and no defenders except among those who believed in the omnipotence of legislation, and who justify the acquisition of property by power rather than by right.

The legislature had the *power* to enact the statute, and the

court to sustain it, so far as any written limitations upon the power of either were concerned, for there were none, there being no provision in the State constitution at that time, that no person should be deprived of his *property* without due process of law, to restrain them, and the Fourteenth Amendment was not adopted until years later, and the Fifth Amendment had been declared by this Court to be a restriction upon the general government only. *Barron* v. *Baltimore*, 7 Pet. 247; *Lessee of Livingston* v. *Moore*, *Id.* 554.

"But when in the year of grace 1866," as is said by this Court in *Davidson* v. *New Orleans*, *supra*, "there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law, which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

But the act that was upheld by these cases was totally different from the one under consideration. It required the land owner to have the land, *then* owned by him, to be entered on the land books and charged with taxes, etc., by a certain designated day, a year and a half distant, and "upon his failure so to do," the lands should, after that day, be forfeited.

The forfeiture was confined to a specific time and was in terms the penalty for the land owner's failure, and was very different from the provision that the land shall be forfeited whenever "the owner shall not have been charged on the land books with State tax on the land" (by the State authorities, that alone have the power). The confiscation in the first case had at least the merit of being confined as to time and specific as to cause; it had no other, nor the above cases in Grattan any authority outside Virginia nor there since 1866, except upon that particular statute, and never were entitled to weight anywhere. The principle involved in them has in effect been repudiated by the same court in later cases. *Boggs* v. *The Commonwealth*, 96 Va.; *Bennett* v. *Hunter*, 18 Gratt. 100.

In noting the requirements for the reports and records to be made and kept of lands alledged to be forfeited, it has not seemed needful to point out the analogies that exist between these and the like records in sales of lands for taxes. They are obvious, and the rule of strict construction and strict conformity ob-

viously applies; but the real evil and infirmity lies deeper than any mere matter of form, or manner of proceedure. The Article itself is essentially, inherently and fundamentally out of harmony with right and justice and the principles that underlie our system of law and government. It is iniquitous in principle and purpose, and can never work anything but wrong and injustice. It accomplishes nothing for the State but scandal, and for the person securing its benefit nothing for which he is entitled to any aid from the law or from the State. It does not contribute to the wealth or welfare of the State, but tends to debauch her citizens and her public officers. If any person's land has in any way escaped taxation, it has not escaped from the taxing jurisdiction, and the Court will deprive the State of no remedy by wiping out this provision; for she can tax the land and sell it or sue for the tax, instead of confiscating the land and squandering it in prodigal distribution; and this fact may not be without its comforting influence, when the question "must be met" as the said court in *Arrowsmith* v. *Burlingim*, "fearlessly but with a sense of responsibility incurred by a judge when he interposes the aegis of the law in defense of a citizen whose property is divested by a legislative act which imputes to him no blame and holds out to him no recompense for his loss."

The forfeiture provision being invalid, because it is a law impairing the obligation of a contract; because it takes private property for other than a public purpose; because it imposes an excessive fine or penalty and inflicts a cruel or unusual punishment without offense; because it invades the province of the judiciary and denounces a legislative sentence; because it takes the property of the citizen without compensation, and without trial, hearing or notice; because it operates against common rights and justice; because it abridges the privileges and immunities of the citizen; because it denies to a citizen the equal protection of the law; and because in these and other ways, it deprives a person of property without due process of law, it should be declared by this Honorable Court to be null and void, and the judgment of the Circuit Court should be reversed.

## CONTENTIONS OF DEFENDANTS IN ERROR

It was provided by the stipulation between counsel herein, that briefs should be exchanged before printing, for the purpose of enabling each side to reply, but counsel for defendants in er-

ror were unable, as they tell me, to complete their brief in time for such exchange, and I am therefore obliged to consider what I am advised by them will be their contentions and line of argument upon the main question, as contained in their briefs in other cases of which I have copies.

I shall not weary the court with an analysis of many of the cases that will be cited by them, but it will be found that many of them have but remote, if any, relation to the questions here presented, while others support the contentions of plaintiff in error, and few or none militate against it. Some of the authorities cited in said briefs, and which I am advised will be cited and relied upon by counsel for defendants in error, in this case, I shall notice, so far as extracts therefrom are given, by defendants in error.

## UPON DUE PROCESS OF LAW.

*Giozza* v. *Tiernan* 148 U. S. 657:

"'Due process of law' within the meaning of the 14th Amendment, is when the laws operate *on all alike*, and do not subject the individual to an arbitrary exercise of government."

*Bell's Gap R. E. Co.* v. *Pennsylvania* 134 U. S. 237–8:

* * * "But clear and hostile discrimination against particular persons and classes, especially such as are of an *unusual character, unknown to the practice of our governments*, might be obnoxious to the constitutional prohibition."

*Barbier* v. *Connolly*, 113 U. S. 27, 31:

"The Fourteenth Amendment in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no *arbitrary deprivation* of life or liberty, or *arbitrary spoliation of property*, but that *equal protection and security* should be given to *all* under *like circumstances* in the enjoyment of their personal and civil rights; * * that no greater burdens should be laid upon one than are laid upon others in the *same calling and condition*: and that in the administration of criminal justice, no *different* or *higher punishment* should be imposed upon one, than such as is prescribed to all for like offenses."

*Leeper* v. *Texas*, 139 U. S. 462.

"The object of section 1 of the Fourteenth Amendment is not to affect the powers of the State, only so far as to take care that no state can deprive *particular persons or classes of persons of equal and impartial justice* under

the law; and that due process is secured by laws operating *on all alike* and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. * *

As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the common sense of mankind has at last settled down to this; that they were intended to secure the individual from *arbitrary* exercise of the powers of government unrestrained by the established principles of *private right and distributive justice*"—quoting from *Bank of California* v. *Oakley*.

These principles denying to the state the right of *arbitrary* or *unjust* deprivation of life or liberty or spoliation of property, or the right to discriminate against individuals or classes of persons or property situated similarly to other like individuals or classes, are repeated and reiterated, with little variation of language and no variation of meaning, through numerous cases decided by this court, cited by counsel for defendants in error, and by innumerable others that might be cited. I have made the foregoing extracts from their quotations. I do not know how they will be applied in support of the validity of the provisions of Art. XIII of the West Virginia Constitution.

When a State declares to any person that, if a certain act concerning his property, the performance of which rests solely with the officers of the State, shall remain undone for a given time, neither the beginning or ending of which is fixed, by operation of such declaration his property shall become the property of the State, and he shall have no opportunity to dispute or explain the fact, I cannot bring my mind to regard the act of the State as other than "*arbitrary and unjust*" within the meaning of the foregoing authorities; nor am I helped in the effort, by the consideration that the officers of the State have every inducement, except the promptings of honesty and justice, to bring about the state of things by which they can claim the forfeiture.

When the State declares, that when a tract of one thousand acres shall be found in a given situation, the owner shall, by force of that fact and of the State's declaration, suffer the absolute loss and deprivation thereof, and the same shall become thereby the property of the State or of a stranger; but if a like tract of land, of 999 acres, shall be found in that identical situation, the owner thereof may retain his title, and continue in the undisturbed and unquestioned enjoyment of his land, I am unable to look upon such a law as "operating on all alike" with "equal and impartial justice," and my judgment, that it is a "clear and hostile

discrimination against peculiar persons and classes, especially such as is of an unusual character, unknown to the practice of our government," is not shaken when I learn, as I do from the argument of counsel and some of the adjudications they cite, that this law was enacted largely because the owners of large tracts of land are chiefly non-residents of the State of West Virginia.

And that is true. The larger tracts of land are owned by non-residents, because the portions of the state where such lands lie, are by nature and must forever remain, unsuitable for residence and cultivation and civilized life and are valuable only for their timber and minerals.

Nothing could more clearly and forcibly illustrate the danger and certain viciousness of unlimited legislative power, or power of any kind, intrusted to the state, unrestrained by the Federal Constitution and the Federal Courts. Of this danger Edmund Randolph must have been conscious when, urging the adoption of that Constitution in the Virginia convention, he declared that the Constitution of Virginia had benn violated from 1776 to date, through acts passed by the legislature, whereby contracts, titles and life had become insecure. It is to be regretted that those violations did not cease after the adoption of the Federal Constitution; but it was not until 1866, and the declaration that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," that the confederation became a Nation, and wielded anything more than a sword of lath over the heads of recusant sovereignties.

Virginia, up to 1835, led several crusades against lands and landowners, and being beyond the reach of federal control, scourged many of the large tracts of land out of existence; and West Virginia, soon after she got out of swaddling clothes and civil strife and gathered back her law makers from the opposing armies, to which they had respectively lent their aid, opened war upon property rights and began with the land of non-residents that had survived the early carnival of confiscation, a saturnalia of rapine and plunder and a "communism of pelf" that has existed up to the present time, with laws for forfeiture, adverse possession and color of title, the counterpart of which cannot be found in the annals of the law.

The land laws enacted in West Virginia are such as may be expected where one class of people make laws for the govern-

ment of the property of another class. Where the trespasser makes the law by which he shall hold property upon which he has encroached, the laws will be liberal—with the other man's property.

The passion and prejudice of which Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Pet. 137, feared the effect, has been well exemplified in West Virginia. Happily, however, very little land has come within the operation of the forfeiture provision of her constitution.

While the Supreme Court of the State has never held the forfeiture law of West Virginia to be valid, and as I believe, never will, and has not, until lately, been confronted with the question, the court, as previously constituted, has apparently contemplated the early Virginia acts with approval and pleasure, and counsel for defendants in error will doubtless quote with pride, as they have heretofore done, from *McClure* v. *Maitland*, 24 W. Va. 525 this declaration with regard to the scheme of forfeiture:

> The whole history of the system shows a most earnest and determined effort on the part of the legislature, the judiciary, and the people, speaking through our present constitution, to destroy and annihilate the titles of such delinquent owners.

To have these lands placed upon the books by the assessors and taxed and sold, if the taxes were not paid, did not suit the wise and benevolent purposes of the law makers, who didn't want revenue but wanted only to "destroy and annihilate" titles to property and to break up estates.

Exalted purpose, glorious achievement of the legislature, the people and the courts! Proud indeed would we be to hear this related of us by a barbarian traveler at the court of a barbarian despot.—Here is the apotheosis of nihilism!

With pain we hear this said of the judiciary by the judiciary. We can understand the patriotism of legislators, scheming politicians, who are ready to sacrifice other peoples' property to the STATE with one hand while they receive it from the state with the other; but we cannot comprehend how Judges can contemplate such outrage upon the law without righteous indignation.

For the Courts know that forfeiture laws, past and present and especially the present one, besides their other vices, are pregnant with temptation and allurements to bribe and seduce

public officers and corrupt public justice. Wherefore forfeitures are hateful in law and should have no place between the State and the citizen.

"For the bill of rights has particularly declared, that excessive fines ought not be imposed, nor cruel and unusual punishments inflicted (which at a *retrospect to some unprecedented proceedings* in the court of King's Bench, in the reign of king James the second); and the same statute further declares that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory throughout of the old Constitutional law of the land; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times *undue means and more violent prosecution would be used for private lucre than the quiet and just proceedings of law would permit.*" Bl. Com. IV. 379.

Among the means by which it is charged in the preamble to the constitution adopted by "the delegates and representatives of the good people of Virginia in convention assembled" on the 29th day of June, 1776, that George the Third, "previously intrusted with the exercise of the Kingly office in the government of Virginia, had endeavored to pervert the same into a *detestable* and *unsupportable tyranny*" and which led the good people of Virginia to declare such government under the Crown of Great Britian to be "*totally dissolved*," was, "by inciting insurrections of our fellow subjects with the allurements of forfeiture and confiscation." (Va. Code 1849 p. 33).

With these illustrious examples before us, it is not to be comprehended how such forfeiture as we have been considering could meet the approval of any but the ones directly and personally benefitted by it.

Human nature is the same in all ages but Avarice often outruns Justice and Wisdom. The people of Virginia, who had suffered from confiscation and forfeiture, resorted to them as temporary expedients, by laws that operated for a day and expired of their own limitation. The legislature made and could unmake them. The people of West Virginia, who had profited by confiscation, sought to leave a heritage of injustice and oppression to future generations, beyond the reach of legislative mutations, and put the edict of spoliation into their constitution, their supreme law, like carrion thrown into a spring to pollute its perpetual flow.

But they forgot that there was a Federal Constitution—the sleepless guardian of Justice and the Law.

Besides the laudable and benignant purpose of "annihilating and destroying" titles to land that has been ascribed to the forfeiture laws of Virginia, and by implication to the Article of the Constitution of West Virginia under consideration, counsel for defendants in error will cite and quote from *Holly River Coal C.* v. *Howell*, 36 W. Va. 304, thus:

"It cannot be doubted that the policy of the legislature in various acts concerning delinquent lands was not only to secure the Commonwealth her just dues but also (and in the main) to quiet titles in the western part of the state, and to remove the check to population and to the settlement and improvement of the country which their unsettled condition served to create. The policy of the law was to convey a good title under these sales as far as the commonwealth had the means of so doing. * * *"

The fact that West Virginia is not only the most sparcely settled state east of the Mississippi river and still leads the world in land litigation, testifies how well the *policy* of promoting population "by the allurements of forfeiture and confiscation" and of quieting titles without the intervention of the courts, has succeeded.

"To secure the commonwealth her just dues," instead of enforcing a tax upon the land, the land is taken from the owner and given to another; to promote settlement of the country the land is given to one who may already be in possession; and to quiet titles a controversy is created where none existed before. In view of these facts one is inclined to wonder if it would not have been as well if the state had promoted her policy by providing "for a judicial trial to establish the guilt of the accused," and the fact upon which the forfeitures were claimed, as is suggested in *Wong Wing* v. *United States*.

*Hagar* v. *Reclamation, Dist.* 111 U. S. 707.

By due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adopted to the end to be attained and whenever it is necessary to the protection of the parties, it must give them an opportunity to be heard respecting the judgment to be sought. The clause in question means therefore that there can be no proceeding against life, liberty or property, which may result in the deprivation of either without the observance of those general rules eslablished in our system of jurisprudence for security of private rights.

In the West Virginia forfeiture law what "forms of law" are followed? If the object of the law is punishment, it certainly

is "adapted to that end" it cannot fail—but it gives no opportunity to be heard. If the object of the law is revenue, is the process (?) appropriate to the case, which, instead of charging and collecting a *tax* either confiscates the *land* or bestows it upon another without price? Is it "just to the parties to be affected" that because *the State has failed to charge the taxes*, it should take the land—without any proceeding therefor?

"Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and opportunity to be heard; so also where title or possessson of property is involved." This paragraph is quoted in *Lent* v. *Tillson*, 140 U. S. cited in same brief.

This takes the legs from under the contention of defendants in error, for what but title is involved in the forfeiture? Counsel for defendants in error have heretofore, at times, laid great stress upon the fact that the forfeiture provision deals only with the *title* and that the person divested could have his "due process" when, his title being gone, proceedings should be had to expell him from possession.

Such a proposition is to charge the Fourteenth Amendment and this Court with Punic faith, for if a man can be deprived of his title *without* due process, it will be easy afterwards to deprive him of the unlawful possession, by due process. When this court, in the above case, said that the provisions of the Fourteenth Amendment are an additional security to the like provisions in the constitutions of the several states, "against the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property, that neither can be taken without due process of law," it meant, that that guarranty should apply to property of every kind. It did not mean to give the protection of the law to the incident, the shadow, and withhold it from the substance.

I know not what the gentlemen conceive to come within the term, "arbitrary spoliation of property"; but if the absolute and final assumption by the State of the title of the citizen to his land, to make a largess of it to a trespasser, for no violation of any law, and for no delinquency of which he is accused; for no act or omission that can deprive or delay the State of any right or remedy against him or his property; without notice of such assumption of his property; and without opportunity or right of redemption;—if this does

not fit the words, "arbitrary spoliation of property" it will be hard to exemplify their meaning.

*United States* v. *Repentigny*, 5 Wall, 211.

This was a proper case of forfeiture, such as I have spoken of at page 21 *et seq.* hereof. Here was a feudal tenure, a conditional estate and condition broken. Rather than remain in the country after its conquest, and give allegiance to, and hold under, a new sovereign, the tenant had fled the land and realm; and the United States, the successor to the paramount title, the lord paramount, had entered after breach of condition and resumed the actual possession of the fief.

And this court "agrees that before the forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or in the language of the common-law, office found or its equivalent." The legislative act that was held to be such equivalent, was an act directed at a particular tract of land, passed *after* the breach of the condition of the fief, and directing the resumption of the possession of the land, the title already being in the United States. The Act of Congress was not the cause, the beginning and the end of the forfeiture; the cause of the forfeiture was prior to and independent of the act. That case has not the remotest resemblance to the one at bar.

## THE FORFEITURE AS AN ABANDONMENT.

Counsel for defendants in error, will contend, unless they have been convinced of the folly of it, that "the failure of the owner to have his land entered on the land books" is "equivalent" to a declaration of abandonment of the land by the owner, a declaration that it isn't his, that he doesn't want it, that the State or any one else can have it, &c.; and that the provision of the constitution is, in substance and effect, a declaration by the State, that the owner of the land has abandoned it, and doesn't want it, and has dedicated it to the State and all others who may care for it.

To what declaration of the owner the *failure of the State to tax the land* or its dropping it from the land books *after he has had it entered*, which only is the cause of forfeiture, is equivalent, I have not heard stated.

"Abandonment includes both the intention to abandon and

the external act by which the intention to abandon is carried into effect." Am. & Eng. Enc. Law.

To constitute an abandonment there must be the concurrence of the intention to abandon and an actual relinquishment of the property. *Judson* v. *Malloy*, 40 Cal. 299. Intent is the essence of abandonment, and it can not be contended in seriousness, that the legislature can supply an intent that does not exist in fact, and make an abandonment of property that the claimant is endeavoring to hold and of which he is in actual use and enjoyment; for the forfeiture provisions make no distinction between vacant lands and those that are held in the fullest use and occupancy.

"Oh! but," say the counsel, "the Article deals only with the title and not with the possession," and imply, if they do not assert, that the *land* and not the title—the ownership, is "property." They do their intelligence injustice. I will only refer them to *Wynehamer* v. *The People*, 13 N. Y. 378. Their plea that it is the *title* that is abandoned, surrenders the whole contention, for there is no such thing known to the law as loss of a perfect fee simple title to land, by abandonment. Equities, easements, inchoate titles and rights and such like, may be surrendered and abandoned. Possession, which pretains to the land, may be abandoned, but the title, which inheres in the owner, if it be complete and perfect, cannot be shaken off like a garment. It has long since been established that the leopard can "change his spots" at will, by leaving one spot and going to another; but it remains true that "the Ethiope cannot change his skin."

Mr. Washburn has investigated the subject of abandonment and the authorities upon it and announces the result as follows :

"It is probably not too strong a conclusion to assert that in no case can a man lose his title to a freehold in land by any act or oral declaration of abandonment, unless it comes within the catagory of estoppel, or is followed by such a possession by the person claiming title thereto in his stead as brings the case within the statute of limitations. It was with a view to this conclusion that several of the cases above mentioned have been cited, to show that it was not the abandonment by the original owner in favor of another that gave the title, but the possession by the latter being continued the requisite length of time to allow the statute of limitations to take effect." (Washburn on Real Prop. Vol. III, p. 66-67.) The position here taken is further sustained by *Davenport* v. *Turpin*, 43 Cal. 597;

*Smyles* v. *Hastings*, 22 N. Y. 217; *School Dist.* v. *Benson*, 31 Me 385. Tiedeman on Real Prop. Sec. 739.

"Nevertheless," they say, "it is within the legislative power by enactment operating *in futuro*, to say that a failure to enter the land shall be evidence of intent to abandon it."

Nevertheless, I say, that has not been done or attempted, nor could such failure be made *conclusive* evidence, both for the reason, as is shown, there can not be an abandonment of a complete title, and because the State cannot accomplish by indirection what she cannot do directly. If the Constitution had attempted it, that would have been a different case, but having the use of the entire English language, the authors of the Article could as well have declared that such act should be an abandonment, as to make the declaration they have made. Instead, however, of attaching any significance or effect to the failure of the owner to "have his land entered," they chose to declare, in words that need and permit no farfetched and fanciful translation, that "when * * * the owner shall not have been charged on such land books with state tax on the land, then, by operation hereof, the title shall be forfeited,"—not abandoned nor anything else, but just *absolutely forfeited* and vested in some other person. The Constitution does not employ any euphemism, and if counsel for defendants in error are ashamed of the word "forfeiture," they have betrayed no delicacy about retaining possession of plaintiff's land by virtue of it.

## FORFEITURE AS A LIMITATION LAW.

Equally strained and ineffectual is the effort of defendants in error to find an analogy between the forfeiture and the statute of limitations, or to make of the forfeiture provision a limitation law. This would also have been easy for the authors of the law to do, but they seem to have been satisfied to make it simply a forfeiture—there were limitation laws already. But they argue, or have argued, "The law is therefore that the title of the individual may, by adverse possession of another individual, be transferred to that other without any hearing or process of any suit."

That is not the law. The title is not transferred. The power to assert it against the adverse holder is gone, but the title of such adverse holder is a different one. There is no privity of estate, but hostility between them.

The Article in question purports in express terms, of itself, "by operation" of itself, to take the title out of one person and put it into another. It is not by the act of the one divested nor of the one invested, (except it be the State) that the title is "transferred", but it is by the act or operation of the law. No limitation law ever attempted to do this, nor would it be valid if it should attempt it.

The statute of limitations does not pay the debt, but presumes from lapse of time that it has been paid, if a debt existed, and will not let the creditor wait till all evidence of payment may have been lost, before enforcing his demand. In real actions the defendant is in possession of the land, claiming title and exercising all the rights and acts of ownership openly and against the world, and when this is done for a sufficient period of time, it is assumed that his deed or grant gives a better title than that of the demandant, and presumes the grant itself if need be. Demandant's title is not transferred to defendant, who has a better one, and is not taken from him by law. The law leaves the parties where it finds them—where the demandant has so long left the occupant of the land, and will not help him get the possession. If this is depriving one of his property, "without due process of law," as the gentlemen contend, I fail to see how the fact justifies the Article in question, or the taking by it.

Apropos of this subject what the court had to say in *Arrowsmith* v. *Burlingim*, 4 McLean 494 is of interest.

"Is the defendant protected by the statute of 1838-9 'to quiet possession and confirm titles to land? The defendant contends that it is in effect a limitation law. If not, that it is within the competency of the legislature to act upon the right in this matter so as to divest it. So much of said act as is material to this controversy, is as follows, viz.

'Every person in the actual possession of lands and tenements under claim and color of title made in good faith, who shall for seven successful years continue in such possession and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title.'

Is it a limitation law? It does not profess to be one either in its title or body. But it is said at the bar, that limitation laws have their origin as to real action on the assumption of abandonment. No adjudged case or dictum in support of it has been shown and none is believed to exist, but abundant authorities can be shown to the contrary. See Blackstone's Com. 188 and following pages. That position is dismissed with the remark, that it is more ingenious than solid.

It is then a legislative conveyance and adjudication of one man's land to another. * * * Can legislatures in this enlightened age,

with written constitutions to restrain them, take from one and give to another his property, with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation."

*State Usage as Due Process.*

Counsel for defendants in error will contend, that whatever was the usage of a State, prior to the adoption of the Fourteenth Amendment, becomes and remains "the law of the land" thereafter; and they will endeavor to sustain Article XIII upon the statutes and adjudication of Virginia prior to the diremption of that State and the creation of West Virginia.

Without going into a discussion of the general proposition, but only noting my dissent from it in so broad and sweeping terms as they will propound it, it will be found not only that the doctrine has no application to this case but that it is not supported by anything found in the laws or adjudications of Virginia.

It is not to be believed that it was intended by Congress when it proposed, or by the States, when they adopted the Fourteenth Amendment, that the provision of any temporary statute or of any special proceeding however extraordinary, however at variance with the common law or the customary course of law, however repugnant to right, justice and the fundamental principles of free government, that may have found temporary countenance in any state, under conditions peculiar to the time, should thenceforth, for all time and for all purposes, be taken out of the operation of the Federal Constitution; but howsoever that be, the provision of the Article XIII, was not in the law of West Virginia when the Amendment was adopted, was not and never had been the law of Virginia, or so far as I know, of any country on the face of the earth, and there had been nothing in the laws of Virginia in any way resembling it, for some thirty years prior to the adoption of the Amendment. Nor have the principles of forfeiture statutes like those of Virginia been recognized and approved as "due process of law" in this country, but, as the many adjudications herein cited show, they have been rejected and denounced by the courts throughout the land.

It is not necessary, however interesting it might be, to go into an extended examination of those statutes, but a brief reference to them is in order.

An act passed December 13, 1792, provided that if taxes on

any tract of land remained unpaid for three years, the land should be forfeited; but the literal purpose of the act was defeated by the court in *Henning* v. *Bererly*, cited at page 50 hereof.

An act passed December 19, 1796, provided that no lands should be deemed forfeited for non-payment of taxes, unless returns and notices required by law were made and given.

By acts passed from 1803 to 1810 lands were made forfeitable for non-payment of taxes from two to three years, but the owner was given from one to three years to redeem by paying back taxes.

In 1810, it coming to notice of the general assembly that certain persons had omitted to enter their lands on the books of the commissioners of the revenue, an act was passed February 5th of that year whereby the lands of persons failing to enter them upon the commissioners' books of the proper county *within eighteen months* after the passage of that act, should be forfeited. The lands were to be sold and the proceeds paid into the public treasury.

This was the first attempt made to forfeit land except for non-payment of taxes assessed.

By successive acts passed from time to time up to 1814, the time within which to enter lands was extended, and February 9th, 1814, the act was repealed and all forfeitures remitted. The act was of no practical importance. No other act for the forfeiture of lands, except for non payment of delinquent taxes, was passed for twenty-five years, and the time of redemption of lands, so forfeited, was extended from time to time up to 1834.

The act of February 27th, 1835, was the next and only act but one, after 1810, for the forfeiture of lands for failure of the owners to list them for taxation and pay the taxes. This act, among other things, and after reciting that it was known to the general assembly, that certain large tracts of land west of the Allegheny mountains never had been, or for years past had not been, entered upon the books of the commissioners of the revenue, whereby no forfeiture for non-payment of taxes had occurred or could occur, and the settlement of the country was retarded, provided as follows:

2. "Be it, therefore, further enacted, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty six, enter or cause to be entered, on the books of the commissioners of the revenue for the county wherein any

such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all the taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonorated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure so to do, all such lands or parcels thereof not now in actual possession of such owner or proprietor by himself or his tenant in possession, shall become forfeited to the commonwealth, after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted."

Section "3" vested the forfeited title in such actual occupants of the forfeited land as they should have *bona fide* legal or equitable title to, derived from a grant from the State since April 1st, 1831, and upon which they had paid all taxes charged and chargeable.

This act is the only one of the kind of any general importance that was ever passed, the operation of the earlier one being postponed by subsequent acts until about the time of its repeal, when all forfeitures under it released.

It will be seen that the Act of 1835, has few points of resemblance to Article XIII of the Constitution of West Virginia.

It dealt only with the lands which *at that time* were not on the commissioners books, and made no requirements of the owner for the future, nor provision for future omissions; and for good reason, because, as I have shown in the early part of this argument, to be the case at the present time, when the lands were once entered on the books, they would be taken care of by the public officers, who, there being no forfeiture provided in case of future omissions, had nothing to tempt them to drop the lands off. If the lands were put on the book by the specified time, they would remain there, and if they were not put on the books, they were swept back into the public domain, where, as they should be disposed of, they would go upon the land books through the regular channels. And so by the single stroke the field was cleared, and the lands put on the books or put where they would certainly go on them.

The Act, instead of relating to "any five successive years" or other sliding period of time, made the date of reckoning definite—July 1st, 1836.

If, however, the land owner failed to comply with the requirements of the act, lands occupied by him or his tenant were

not forfeited. The act was particularly aimed at unoccupied lands, the property of non-resident proprietors. Later there being some doubt whether certain lands exonorated from forfeiture for non-payment of taxes, by a previous act, were embraced within the operation of the Act of 1835, an Act was passed April 12th, 1852, providing, that if any such lands were still off the land books, they should be entered thereon and the back taxes paid by the owner, in default of which such of said lands as were not occupied by the owner or his tenant should be forfeited after July 1st, 1853. This Act was an unimportant one in effect. (For digest of the foregoing acts, see Hutchinson's Land Titles, p. 5, et seq.).

This was the end of forfeiture laws in Virginia.

It will be seen, that while the provision of the West Virginia Constitution, adopted in 1872, operates in terms from 1869 to the end of time, the Virginia acts did not operate *in futuro* except to fix a definite date when the penalty should attach, but applied only to lands that, at the time the acts were passed, were not on the tax books. They related to the present, operated in the present, and expired by their own limitation. They were in precise terms, penalties for the owner's "failure so to do" and affected all tracts of land, irrespective of size. The Article of the West Virginia Constitution operates *in futuro*, has no limitation of existence, but flows on with the current of time, applies to no definite point of time or period of time, discriminates between tracts of land on account of size, and puts upon the land owner punishment for the sins of the assessor or other state officer.

Nothing can be said for the validity of the Virginia acts except by contract with the West Virginia provision.

And so I say, that when the Fourteenth Amendment was adopted in 1866, there was no forfeiture law in West Virginia, and had never been; there was no forfeiture law in Virginia and there had not been for many years, and there had never been in Virginia any law resembling that of West Virginia; and the Virginia statutes, and the adjudications that declare their validity, that cannot be sustained upon legal principle or authority, nor justified upon grounds of legitimate policy, furnish no valid precedent for the forfeiture provision before us, nor support to those who assert its validity. As I have previously said, when those acts were pronounced valid by the Courts of Virginia, the Fourteenth Amendment had not been adopted, and there

was nothing in the Constitution of the United States to restrain the legislature in the matter, as the Virginia bill of rights provided merely, "that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." "Liberty" may embrace life but not property. If the legislature saw fit to violate the principles of Magna Charta, which was but the Common law in Virginia, it had the power to do it, perhaps, and if the courts of the State sustained the act, howsoever erroneously, there was no help for it. Those statutes determined the titles to the lands upon which they operated. Where they destroyed them they ceased to be, and where they created them they have come down to us.

The statutes were but legislative judgments. They effect the land forfeited by them and no other and constitute no rule of law or of proceedure, any more than does any other sporadic outrage of law or morals. The courts of West Virginia have had only to *apply* these statutes, they could not *adjudicate* upon their *validity or invalidity*, for that was settled and the question barred before West Virginia was formed; and whatever has been said by the West Virginia court, in support of their validity, it was bound to say, because it was *res adjudicata*; but these sayings do not apply, and should not be applied, to any other act, similar or dissimilar.

Only the Act of 1835 was of any operation or consequence. It was passed, effected its purpose, and expired thirty years before the Fourteenth Amendment and thirty-six years before the West Virginia Constitution. It was never the law of the land in Virginia—certainly not after its expiration in 1836, and certainly not when the Amendment was adopted and when West Virginia was created. It furnishes no support for the doctrine of State usage as due process of law, put forth by defendants in error.

Counsel for defendants in error will cite *Armstrong* v. *Morrill*, 14 Wall, 109, and insist that this court has sustained the Act of 1835. The decision does not do so.

There was no question in that case over the validity of the Act. Both parties treated it as valid and the court was not called upon to pass judgment upon its validity, but treated it as the parties did, without question, simply saying that the land became forfeited, &c., by virtue of the said Act, "as construed by the Supreme Court, or Court of Appeals of the State." Indeed

the court was bound to treat the Act as valid, for at that time, 1835, as we have shown, the legislature of Virginia was supreme and the Federal courts were without authority to question a state law for want of "due process."

The case of *Bennet* v. *Hunter* and other cases tried and reported together, 18 Gratt. 100, and which were affirmed by this court, 9 Wall, 326, cited at p. 52 hereof, strip the earlier cases of all their authority upon the general principles involved in them.

That case holds that:

> **Congress has not the power to impose the penalty of forfeiture of lands for the non payment of taxes assessed thereon. Congress has all the powers for enforcing the collection of its taxes that were in use by the Crown of England, or that were in use by the States at the time of the adoption of the Constitution of the United States; but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax.**
>
> **If the forfeiture provision of this act is to be regarded as absolute and as a penalty upon persons engaged in rebellion against the United States; then it is a legislative conviction and punishment without trial, of all who fail to pay the tax and is a violation of the provision of the constitution which forbids Congress to pass bills of attainder.**

Apply this to the case at bar; forfeiture of lands for non-assessment of land "was not in use" in Virginia or West Virginia at the time of the adoption of the Fourteenth Amendment.

If the forfeiture of lands provided by the laws of West Virginia is to be regarded as absolute and as a penalty upon persons whose lands are not assessed with taxes, then it is a legislative conviction and punishment without trial, of all whose lands are not assessed, and is a violation of the constitution which forbids any State to pass a bill of attainder.

The Virginia forfeiture Acts, like the West Virginia law, were confiscations, pure and simple, and so far as their purpose was to "settle the country and quiet titles," they and the adjudications sustaining them, were as destitute of the reasons supposed to justify them, as they were abhorrent to law and justice, and they failed of their purpose, for the titles were quiet until the State undertook to divest and distribute them, and the settlement of the country, if it was not retarded, was not promoted, by the despotic power assumed by the State, and the disturbance and insecurity necessarily following. People have not been attracted to either state "by the allurements of forfeiture and con-

fiscation," and land titles have been thrown, by the acts of both States, into a confusion from which they have not yet emerged and never will emerge, until the sins done to the Constitution of West Virginia "are burned and purged away."

Virginia, impoverished by the Revolutionary struggle, in order to realize something from the wilderness west of the Alegheny mountains, offered her land and sold it in large bodies, because there was little demand for small tracts, to many persons, who, like Robert Morris and the State and by the same cause impoverished, hoped also to restore their fortunes out of the western lands, then a *terra incognita*. Later, the State, attributing to her former policy of making large grants the tardy settlement of the country, which was properly attributable to the uninhabitable character of the land, endeavored by her laws, as some of the courts have thought, to encourage settlement by breaking up, by every possible means, these large estates. The cause of the sparce settlement of the portion of Virginia and West Virginia principally concerned by the forfeiture laws, has been wholly misunderstood, for no fact is better known than, that no settler was ever, to the present day, deterred by the large grants, but every acre of land fit for cultivation, and thousands of acres that are not, were taken up and settled under junior grants, before the formation of West Virginia, and without the slightest reference to, or regard for, the large grants or their owners. If there had been more land that would sustain life, the large grants would have suffered worse.

When the world demanded of West Virginia her coal, and built railroads to it, there came a possibility of permanent and substantial development, and with it there comes embarrasment, not from the existence of the few large grants that have survived the law and the settler, but from the infamous systems of land laws and forfeiture laws that have grown up out of unholy endeavors to "destroy and annihilate titles," instead of leaving them to the operation of ordinary taxation and reasonable statutes of limitation.

*Reed* v. *Dingess*, 60 Fed Rep. 21, will be cited for defendants in error, as sustaining the contention of defendants and upholding the validity of the forfeiture laws, but it distinctly does not do so; it discusses the question and leaves it, the case turning upon other points.

Some observations of the learned judge there are, tending to

excuse such forfeiture laws. He suggests that: "When the state bids in land it obtains a tax title, and it is a matter of common knowledge that owing to irregularities of one kind and another, tax titles are seldom perfect." A title that is good enough for the private purchaser, ought to be good enough for the State; but the State may provide for a collection of the tax by suit and judgment and judicial sale of the land, which would obviate the objection. Continuing, he says: "Laws like these of the Virginias strike at the root of both of these difficulties" (void tax titles and omission of the land). "They forfeit the land upon the failure of the owner to have himself charged upon the proper books for taxation." [Note the misapprhension of the terms of the law ] "and vest title immediately in the State; thereby avoiding all questions of validity of title, which might otherwise arise upon possible irregularities in assessment and on proceedings previous to or at the sale."

Far be it from me to criticise not the *opinion* but the *dictum* of the learned judge, but I am moved to observe that in criminal proceedings if we would straightway hang the person charged with crime, we would avoid all danger of a hung jury, and all questions that might arise upon the possible innocence of the accused.

"If" says the learned judge, "such legislation can be sustained, it is more effectual than other common modes of collecting real estate taxes."

It would seem, though, that while, "*if it can be sustained*" they may "collect" the *land*, it is wholly ineffectual to collect any *tax*.

And commenting on the demand of the plaintiff in the case for some judicial proceedings before title shall be divested the court declares:

> "We know of no reason why a forfeiture of title to land for sufficient cause, by statute or constitutional legislation, is not by 'due process of law'. It certainly is not that arbitrary exercise of the powers of government which Magna Charta intended to prevent when it declared that no person should be deprived of life, liberty or property except by the judgment of his peers or the law of the land."

"For sufficient cause" must be accepted as a most important qualification, but even with that we may be permitted to hold to the view that for *no cause whatever*, can a forfeiture be at once created, completed and declared by legislative act.

It is some matter of regret, that in this connection the learned judge did not take occasion to suggest some example of what would be "that arbitrary exercise of the powers of government which Magna Charta intended to prevent."

"The objection seems to be" says the court "not to the right of a State to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty. All penal legislation does that. It is to declaring the forfeiture complete by the act, without any legal proceedure. But, if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the State to inforce the forfeitures."

If this be the true rule, then it should apply "to all penal legislation", and all criminal offenses can be tried collaterally by civil proceedings, and upon the rule of evidence in civil cases and without complaint first being made. "But if the act, in every case of its commission involves" the penalty, we may dispense with the court and manage to do with the legislature and the sheriff.

I think it will appear by reference to the authorities hereinbefore cited at page 49 *et seq.*, and especially from *Wynchamer* v. *The People* (52) *Irvin* v. *Lumbermens Bank* (70) *Marshall* v. *McDaniel*, (72), that this dictum of the learned judge is not sustained by the weight of authority and certainly not by principle.

The court suggests that the objection of counsel "is not to the right of the State to provide by legislation that a certain act or omission shall work a forfeiture, but to declaring that the forfeiture shall be complete by such act without any subsequent legal proceeding." That may be true in that case, but I have endeavored to make as emphatic as possible the contention of this plaintiff in error, that not only a forfeiture for whatever cause cannot be adjudged collaterally, cannot be proven as here attempted, and cannot be made complete by the legislative act that provides for forfeiture *in futuro*, but that, so long as the Constitution of the United States and the principles of Magna Charta endure, the State is without power in any or all of its departments of government, without proceedings of any sort, or by them, to confiscate under the name of a forfeiture or any other name, the land of a citizen, to be retained by the State or to be bestowed upon a private person, when or because the State has failed to tax it, or because the owner is not, for any reason whatever, taxed for it. To state this proposition in its

nakedness is to command the assent of all who understand the genius of our government, To admit that a State has such power is to assert that the Federal Constitution is a jugglery with words, and that we hold our lives, our liberty and our property at the mere will of a few peddling politicians and upon such terms as their caprice may prescribe; for if the State has such power, then we can, without offense or cause, be attainted, exiled, outlawed, imprisoned and executed and our estates annihilated by an act of the legislature without the aid, and in spite of the protection, of the courts. But none of these things can be done under the Constitution.

## THE FORFEITURE AS A TAX LAW.

Counsel for defendants in error will insist that this forfeiture provision is a tax law or revenue law, and will cite many authorities to show that by reason of the urgent demand of the State for her taxes, she cannot abide "the law's delay" and may resort to summary proceedings, and that in matters concerning the levying and enforcement of taxes that due process of law requisite in all other proceedings, is dispensed with. This is an admission that there is a want of such due process as is required in other cases, and is a surrender of the case, if this is not a tax law.

No one will contend that an adjudication of court is necessary to the validity of a tax or assessment, although some of the States have adopted that course, nor do I deny the right of the State to proceed summarily in the levying and collection of taxes; but "summarily" is not equivalent to "arbitrarily," nor does it involve the right to ignore or override the rights of property.

The urgent necessity that demands arbitrary proceedings and such as deprive citizens of substantial rights and opportunity to assert them, never exist in the levying and collection of taxes; and that necessity which will warrant even a millitary commander, in time of war, in taking private property without the consent of the owner, for the preservation of the army and the defense of the country, must be actual and immediately pressing, and then the owner is entitled to compensation. *Holmes* v. *Sheridan*, 1 Dill., 351; *Mitchell* v. *Harmon*, 13 How., 115; *Grant* v. *U. S.*, 1 Ct. of Cl. 41.

The customary proceeding for the levying and collecting of

taxes, to be found in almost every state and country, affording notice of every important step, and opportunity for the citizen to be heard in the matter if he desires, and extending usually over a period of six months or more, measures the urgency of the State in the matter of taxation.

The State of West Virginia could, at any time, through her officers, if in no haste about the matter, enter any tract of land upon the land books, assess the taxes, sell the land, if need be, and collect the tax in six months; but being in "urgent need" of revenue, shewaits five years for the land owner to have his land taxed, and if it is not done, no matter for what reason, or under what circumstances, the State refuses to receive the taxes from the owner, but appropriates the land, and so much of it as is not gratuitously bestowed upon private trespassers, is sold by the commissioner of school lands to himself and his friends for the cost of crying it off—to the end that the State gets neither the tax nor the land. And this, counsel for defendants in error will urge, is "sanctioned by long and general usage and consecrated by time." Eternity could not consecrate such confiscation.

Such plea of necessity is pitiful and the Constitution, Art. I, 3, says it should not be sustained:

> "The provisions of the Constitution of the United States and of the State are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity, or any other plea, is subversive of good government and tends to anarchy and despotism."

If counsel for defendants in error class this as a tax proceeding, let us see how it meets some of the requirements of the law of taxation.

Some of the well established principles of taxation are, that the tax must be for a public purpose; that taxation must be uniform upon the same class of subjects, uniform, of course, as well in the enforcement as in the levying; that at some stage of the proceedings the owner shall have notice of the assessment or of the proposed enforcement of the tax. These at least and some others are essential, and a tax levied without regard to them, the law attempting to authorize it, and the proceeding to enforce it, would be alike void.

Treating the provision before us as a tax law, all these are wanting; the law operates on tracts of land of a thousand acres or more and does not affect similar lands of a less quantity;

there is no notice or provision for notice, no proceeding of any kind before or after; the land is taken from one person and given to another gratis; and most remarkable of all, for a "tax law" or "revenue law," there is no revenue and no tax.

The enforcement of a tax is the most important part of the whole proceeding, and the character of the taxation, as to its being for a public or a private purpose, is most certainly determined by the final destination of the proceeds. In the case before us we see that the land becomes the property of a private person, and the public gets nothing. The agency and the machinery of the State are operated to a private end and between private persons, and as was said by the Court in *Concord R. R. Co.* v. *Greeley*, 17 N. H., 57:

"Even if the Legislature should declare that an act taking the property of A. and giving it to B. as his private property, was an application of it to public uses, no one would contend that such a declaration made that public, which in its nature and its object was private."

It is said in *Bertholf* v. *O'Riley*, 74 N. Y., 515:

"The comprehensive scope of the guarantee of private property finds many illustrations in judicial decisions in our State. The limit placed upon the power of taxation is an instance. The right of taxation is an attribute of sovereignty, without which governments would be powerless, and organized society could not exist, and it is said to be unlimited. But this is only true when it is exercised for a public purpose. The taking of *private property* for a *private purpose*, under the guise of taxation, is not less a violation of the Constitution, than if the property of A was attempted to be transferred to B, by the mere force of a legislative mandate."

This court has had something to say that is applicable at this point, and said it thus:

"To lay with one hand the power of the government on the property of the citizens and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation." *Loan Association* v. *Topeka*, 20 Wall. 664.

Nor is the Article in question either legislation or taxation. As a tax law it would be void from every point of view; but nothing can be more far fetched and preposterous than the attempt to classify this as a tax law, or as having any connection with taxation or revenue. The very root and essence of the forfeiture is that *no taxes had been charged*. It is not a provision for

assessing and collecting a tax, but for taking away the land from the owner and giving it to someone else, when no tax is levied on it.

The test of a revenue law should be the raising or attempting to raise revenue; but by this provision the State, instead of taxing and selling the land, and getting revenue out of it, hands it over to a bystander, or in default of such, takes it herself. Land upon which taxes have been paid for three-quarters of a century, becomes a gratuity to a tresspasser who has paid taxes for five years.

The proposition that it is a tax law would come with better grace from counsel for defendants in error, if there had not been a very different character and purpose vehemently ascribed to it by them, by whom it is declared to be a declaration by the State of an "abandonment by the owner;" "a limitation law" against him; an act "for the settlement of land titles in the Western part of the State of West Virginia;" an act "to destroy and annihilate land titles,"—unusual ends, surely, to be attained or aimed at, by a "harmless, necessary" tax law.

If titles are to be annihilated or even "settled," why not leave the matter to be accomplished by due process of law through the courts of justice?

The authors of this provision do not seem to have regarded it as having anything to do with revenue, for instead of including it in article entitled "Taxation and Finance", they put it in a seperate article appropriately entitled "*Land Titles.*"

*Concerning Payment of Taxes.*

Counsel for defendants in error will not fail to bewail the depravity of persons "who do not pay their taxes," though by what right they cast the first stone, it will not appear; and it may not be unsuitable to observe in this connection, that there is, upon occasion, vastly too much mock sentiment wasted about the payment or non payment of taxes. No one questions that taxation is necessary to the maintainance of government, no one denies that the payment of taxes is a duty of the citizen and of the owner of property within the taxing jurisdiction, however good or bad the laws may be and however well or badl administered; but no one is unaware that they are not voluntarily contributed but are *exacted* by *law*, made a lien upon property, paid reluctantly, and (pity 'tis, 'tis true) sometimes evaded.

It is not conceivable however that they should be intentionally and deliberately evaded when to save the tax is to lose the land. War, rebellion, and revolution have resulted from the imposition and collection of taxes, and all laws and all courts recognize that tax proceedings are *in invitum*. Men yield eagerly their blood and their lives to their country, but they resist the assessor and surrender taxes only when compelled. It is an infirmity of human nature, inherited from oppressed ancestors, which the law recognizes and indulges.

Strict construction of tax laws and strict conformity by public officers are always required and every provision is construed, every doubt resolved, in favor of the person or property taxed; and this indulgence can well be extended to the owner of land, for he cannot hide the land nor dodge the tax, if the officers of the state care to subject either to the payment. The man who promptly discharges taxes charged against his property is to be admired and appreciated, and the man who pays taxes upon the land of another under a void pretense of title, for the purpose and in the hope of acquiring the land, is entitled to all that a valid law strictly construed and strictly pursued will give him, —he has no equities. If he fails in his purpose to acquire the land of another, for nothing, he is not to be regarded as a martyr, and if he succeeds, he is not to be canonized for patriotic payment of taxes.

## NOTICE TO THE LAND OWNER.

Counsel for defendants in error will cite authorities that hold that in certain assessment and taxing proceedings no notice is required because it cannot change the rights or liabilities of the party, or the course of the proceeding or the result of it; and they will argue from those cases to this, to which the doctrine is not applicable, that the land owner must take cognizance of the law; that if he has not entered his land upon the land books, he knows it, and knows that it will be forfeited in five years, and when that time is up he knows that the land is forfeited and gone, and what good would notice do him, and what would it tell him that he did not already know?

It may be argued with equal force that the taxpayer whose land is on the assessment books, knows, or ought to, that if he does not pay his taxes, the land will be sold, that if he has not paid them he knows it and need not be told it, and that when

the land is about to be sold he knows that, too, and it would be an unwelcome attention to notify him of it; but a law that made no provision for any notice in such case would not stand a moment before any court in America.

But the argument proceeds upon a false basis. No time is fixed by law when the landowner shall do any of the things required of him, nor manner prescribed wherein they shall be done. It does not appear from the law when the five years began or will begin to run—except from 1869, or when it will expire, and it does not appear that the land owner has any means of knowing; he certainly has no notice, and it is perceivable that he may have no knowledge, that his land is not on the land books and taxes charged. But that is not the important matter. When he has had his land entered upon the land books and charged with the taxes for years, and has paid them, how is he to know that the officers have *ceased or failed to charge the taxes*, which alone works a forfeiture, or know *when* they ceased charging them? He is not required or permitted to charge the taxes himself, so that it is not a matter necessarily in his own knowledge, but is a matter very likely to be kept from his knowledge. I can conceive of few things in the affairs of men about which there is greater room for innocent ignorance or mistake, than about each and all these matters, and nothing which by every rule of right, reason and *law*, more imperatively demands *notice* before so grave a consequence attaches as the confiscation of not less than one thousand acres of land, or of one foot of land.

It is argued, too, that when all this is done, there is no need for any inquiry or proceeding about it, for the land owner cannot by any possibility change the result, and so notice and hearing would do him no good. That is not for the statute to determine. It is enough that he is denied the right, whatever might be the result of his defense. The matter of notice should not be belittled however little we may think it may avail.

Notice is the first law of nature, from the hiss of the serpent to mutterings that foretell the wrath of Jove. Summons and opportunity to defend life, liberty and property, the trinity of human law and effort, are not the invention of counsel for plaintiff in error nor of legislatures or courts; there is authority higher and more ancient, which we may not dispute. It is the Voice of the Lord God in the garden: "Adam! where art thou? *

Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?" Then followed the plea and the judgment of forfeiture (the estate was *conditional*) made matter of record.

"What good did notice to Adam do him? What did the Omnicient learn that He did not know before? What good of it all?" say counsel for defendants in error.

"And the Scribes and the Pharisees brought unto him a woman taken in adultery and set her in the midst," saying, "Moses in the law commanded us that such should be stoned; but what sayest thou? * * He said unto her: Woman, * hath no man condemned thee?" She said "No man, Lord."

She was not brought for *trial* but for *punishment* and not having been first *condemned* she was discharged.

Here indeed is law "sanctified by usage and consecrated by time."

"Then spake Jesus unto them again saying: 'I am the light of the world, he that followeth me shall not walk in darkness.'"

## ACQUIESCENCE.

It will be contended by counsel for defendants in error, as I am advised, that the forfeiture provision in question has been so long and so generally acquiesced in that, whatever its legal infirmity, it has become a rule of property, which this court will not now overturn. This plea is upon a par with the one against disturbing the holders of void titles. Defendants have failed to furnish the court with any evidence to sustain the point and none exists. The adjudications of the West Virginia courts have been almost wholly upon Virginia statutes, that they could not lawfully question. Those acts were not of continuing or recurrent operation, they were of a day and did their work in a day although the readjustment and the clearing up of the debris occupied much time. The people did not acquiesce, they were forced to submit by adjudications that were final, but which can not be extended to other acts.

The provision in question has but recently come before the State or Federal Courts for decision, and it is in the nature of the case, that it could not have reached many tracts of land, for land owners would ordinarily be able to keep their lands out of its operation. And referring to the long list of lands reported by the Commissioner of School Lands, (p. 20 *et seq.* of record) which the court will not consider, the statement may be indulged

without going *far* out of the record, that most of those tracts were forfeited under the Act of 1835, and the remainder not at all.

There has been no such acquiesence in the provisions of this Article as becomes "persuasive of its validity," to use the strongest expression I find employed by the courts upon the question; and this court will not be governed in its opinion of the constitutional validity of a law, by the reluctance or inability of any person to discharge the highest duty of citizenship, lawful resistance to invalid laws, and promptly demand his rights under the constitution from the highest courts of the land. I combat the proposition, that I can be bound to the operation of an invalid and outrageous act, by the submission of another, or that any acquiesence however general or long continued will warrant this Court in upholding legislation that is clearly prohibited to a State, and deny to any citizen a constitutional right. The Constitution says *no State shall* do the things prohibited, and it makes no proviso that a State may do them under any conditions, and it attaches no period of limitation to the citizen or "any person" to resist and demand his right. But if there were anything in the doctrine advanced for defendants in error, the facts do not come within the operation of the rule they contend for, and there is no evidence in the record. It may, however, be interesting to observe that such consideration, which we will presume was pressed upon the Court, did not influence the decisions in some of the cases cited herein. The time for which the statutes that were declared invalid in those cases, had been "acquiesced" in for the following periods of years.

*Kinney* v. *Beverly*, 2 Heu. & Minn. 318, 16 years.

*Wilkinson* v. *Leland*, 2 Pet. 657, 37 years.

*State* v. *Heeman*, 70 Mo. 441, 14 years.

*Eastern L. L. & M. Co.* v. *State Board*, 101 N C., 46 years.

*Marshall* v. *McDaniel*, 12 Bush. 378, 51 years; although the court had formerly given a partial approval to the act. Other cases that I have not examined in this respect would doubtless show similar result.

It is not thought that this proposition of counsel for defendants in error, which proceeds upon the assumption that the Article is invalid, can have any weight with the Court.

## OVERTURNING OF TITLE.

I am advised that it will be urged by counsel that to declare the forfeiture laws invalid would upset the title to a vast number of estates, upon which "thousands of homes have been builded representing years of toil and privation by the citizens and actual settlers." The court will decide this cause upon the law and the evidence in this case, without reference to consequences upon other persons; but it will be a comfort to know that the situation pictured by counsel does not exist in fact, and that comparatively few claims of title in the state rest upon a *West Virginia* forfeiture, and of those few, every one is unholy to the last degree and ought to perish. They are gratuities if not frauds, and in most cases both. Nearly all the large grants of the last century, except the lands of the "Swan Estate," of which the grant in question is a part, and a few others which have regularly been charged with taxes, were swept away by the Acts of Virginia of 1835 and were irredeemably gone before West Virginia was founded, and exist now only *sub vacua imagine formae.* The law, invalid as it unquestionably was, was upheld by the Virginia courts, and there was then and probably is now, no authority elsewhere to call it in question, and for the titles that it destroyed there is no resurrection; but the lands that survived have been put on the land books and titles are now lawfully held under the original grants. There probably is not in the State of West Virginia a title resting on the West Virgina forfeiture laws, not protected by she statute of limitation, that has a trace of equity in it. It is not perceived how there would be in the annulment of this law, danger to the just claims of the "actual settler" whose "years of toil and privation" have been spent in the improvement of his land, under any fair application of the statute of limitations and the doctrine of adverse possession, without going to the extent the courts have gone, and embracing all the circumjacent land that can be described in a void deed and tacking it to an original holding. There is nothing behind this scare crow, but if it be a choice whether one shall surrender that which he has unlawfully acquired, or for his benefit, another shall be despoiled of what is lawfully his own, the quicker this forfeiture law is declared null the better. No just claim can be injured, and the State at least, cannot be the loser, for there is nothing to prevent the collection by suit of any taxes

that should have been charged and paid, if any, or the charging of back taxes and collection by sale of the land.

If it is objected that the State or the officers may not know that the land has not been but ought to be, entered and taxed, it is replied that they have at least as ample means of knowing or ascertaining that fact as they have of ascertaining that the land is forfeited for want of such taxation.

There may well be said of this Article as was said by the Court in *Arrowsmith* v. *Burlingim*, 4 McLean, 497-8:

"The act is so fraught with disaster to the country in the insecurity of property that this court must assume that the legislature was not aware of a tithe of the evils they were entailing on the country, if this law were sustained. The principle embraced and put forward in the law is at war with freedom. For the man is a slave whose property is unsafe.

"This act presents a strong anamoly. If the plaintiff had committed a crime causing forfeiture, his property could not be taken from him but upon a judicial decision; but for no imputed fault it is taken from him without trial by this act. * * * The United States sold their lands for a full price and gave a grant in fee simple unconditionally. It is under a grant of this kind that the plaintiff claims. * * * In this case the State of Illinois gives without price that which is not hers, but a citizen's.

"'No person shall be disseized of his freehold, &c., unless by the judgment of his peers or the law of the land.' This is only declaratory of first principles. The only value of it is to restrict the government to a particular mode of divesting the title. 'The judgment of his peers or the law of the land.' The authorities agree that this must be done through the courts."

If the Article of which we complain is not within the prohibition and control of the Federal Constitution, and the courts can afford no protection against such despotism, then we may exclaim with the court in *Vanhorn's Lessee* v. *Dorrance*, 2 Dal. 314:

"Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where Parliament is omnipotent and can mould the Constitution at pleasure, a more sacred regard should have been paid to property than in America, surrounded as we are with a blaze of political illumin-

ation; where legislatures are limited; where we have republican governments, and written constitutions by which the protection and enjoyment of property are rendered inviolable."

The statute books of modern civilized countries may be searched in vain for a parallel to the forfeiture laws of West Virginia. For injustice and despotism they stand unequaled. They are the fruitful source of more fraud, extortion and imposition than the absence of all law could be. Officers trump up the charge that land is forfeited for want of assessment in the name of a certain person, when the land has been charged with taxes in the name of subsequent grantees and owners, and the taxes regularly paid for years, a suit is brought in the name of the State, the land sold, the record covered by void claims of title, and the land with a swarm of trespassers, with resulting suits to remove clouds, as in *Cook* v. *Lasher*, 74 Fed. Rep. 701; *Lasher* v. *McCreary*, 66 Fed. Rep. 834. Owners whose lands have regularly been charged to them and taxes paid, can be made parties to a suit to sell, as forfeited, an overlapping tract or the same tract or part of it claimed adversely or alleged to be forfeited in the name of a former owner, as in cases now pending in the Circuit Court, and be cut out by a decree entered upon service by publication and of which they never heard. From two or more persons the State receives its taxes and the land is forfeited because not charged to still another. Endless confusion and uncertainty concerning titles, which must always depend upon matters *dehors* the record and *dehors* the land itself, and endless mischief to land owners and scandal to West Virginia titles results and will result as long as these forfeiture laws are suspected to have any validity.

This Court has never been, nor will it ever be, wanting in patience to scrutinize every claim of the citizen and every assertion of power by government, nor wanting in courage to repress Congress or a State in every attempt to encroach upon the sacred rights of the individual citizen, whether the interest involved be small or great. Happily legislative transgression of constitutional authority is not frequent, but as said Chief Justice Ruffin in *Hoke* v. *Henderson*, *supra*:

"When unfortunately, such instances do occur, the preservation of the integrity of the constitution is confided by the People as a sacred deposit, to the Judiciary. In the discharge of that duty, the approbation of the legislature itself is to be anticipated; for the principle of virtue which restrains

them from a known and willful violation of it, will induce them to rejoice at the rescue of the constitution from their own incautious and involuntary infraction of it."

In the Judiciary, and especially the Federal Judiciary, is the last refuge, the last sanctuary of right and justice and of the Law. Here is the shield and the flaming sword. Not everything in the form of legislative enactment, not everything that masquerades in the guise of constitutional provision, is law, when measured by the eternal principles that underlie our government, and that our courts and judges are sworn to uphold; and the Judiciary can be sure of the approbation and the gratitude of the Legislature and the people, when by its courageous discrimination the spurious is detected and the law preserved from invasion or contamination.

It is earnestly protested that the verdict and judgment rendered and entered by direction of the court in this cause in said Circuit Court, are erroneous upon each and every of the grounds and for all the reasons herein pointed out; and plaintiff having established his right to recover the land mentioned in his declaration, and defendants having offered no valid defense thereto, plaintiff in error respectfully prays this Honorable Court to reverse said judgment and remand said cause to said Circuit Court with directions to set aside said judgment and verdict and enter judgment for plaintiff therein; or that such proceedings be had therein as may be proper in the law. And this cause is hereupon, on behalf of plaintiff in error, respectfully submitted for decision.

MAYNARD F. STILES,
COUNSEL FOR PLAINTIFF IN ERROR.

See Appendix next page

# APPENDIX.

After completing the foregoing, and at the last hour before filing the same, I have hastily inspected in the clerk's office the brief for defendants in error, and I crave the patience of the court and pause a moment to notice briefly a few matters therein.

At page 3 counsel for defendants in error say:

"In the trial of the cause it was developed in the evidence that neither King, the plaintiff, nor any of his predecessors in title had ever listed the land in question for taxation, nor had it entered on the books of the commissioner of the revenue for assessment and taxation.

"But it did appear that in 1883 there was a pretended redemption of it in the county of Wyoming, when Robert E. Randall owned it. * * * The land had never been entered on the land books, assessed, or taxed since the formation of the State, in 1863."

This is indeed a most remarkable statement. The record is perhaps the best evidence of what was "developed on the trial," and it will be seen therefrom that defendants offered no evidence upon the question of entry and taxation except from 1883 forward. Auditor's certificate (p. 14), the reports of the commissioners of school land, and order of court thereon (pp. 13, 16, 19). Defendants in error discuss no other evidence. Plaintiff proved payment of all taxes prior to and including the year 1883 (p. 30).

Concerning the "pretended redemption," this court need not take the statement of counsel, for that matter is found in McLure *vs.* Mauperture, 29 W. Va., 636, and will show how regardless of facts is the statement of the gentlemen. The redemption by Randall was from a *tax sale* to the State, and Mr. Chilton, of counsel for defendants in error, was counsel for Randall in that case in the Wyoming county court.

There is no objection to counsel discrediting himself if he desires and to his going out of the record to do so, but he will hardly be accorded the right, now that he is upon the opposite side of the case from the successor of Randall, to impugn the character or effect of the redemption.

According to the statement of that case, 200,000 acres of the land had been sold for taxes in the name of Randall for the year 1870, and 300,000 acres in the name of Mauperture for the years 1874, 1875, 1877. This of necessity involves the fact that the land *was entered on the land books and charged with taxes*, and that the taxes for all previous years *had been paid.* The law presumes that, and counsel for defendants in error know the fact.

The land was sold for taxes, and, not being redeemed within a year, was esteemed to be irredeemable—forfeited—and the commissioner of school lands, under a law then in force, brought suit to sell it out in 640-acre tracts, and with the characteristic recklessness of a commissioner of school lands had the taxes computed back to 1839, the year after the passage of the act mentioned by counsel for defendants in error, whereby a trust was created in Dumas for the estate of Colonel Swan, although the taxes had been paid in Virginia and in West Virginia to the time of sale; which facts being shown after the appearance of Randall, the taxes were adjusted accordingly by the court and paid into court by Randall. At the same time, as appears from the case, the Pittsburg National Bank of Commerce (whose title was afterwards united with the Randall title in King's grantor) claimed 365,000 acres of the land and had paid the taxes on the same, and conceiving that the proceeding would adjudge the question of title, became party to the suit to contest Randall's right to redeem. The lower court decided in favor of Randall, and the bank appealed. The court of appeals, carrying out the policy of the State to exact the taxes on a tract of land from as many persons as have or claim title to it, recommended that the bank would also redeem, as the proceeding did not settle title.

I quote the following from the statement of the case:

"The commissioner's report [the case had been referred to a special commissioner] that the taxes on this land in Logan county were pretty regularly paid, but for the taxes of 1879 it was returned delinquent and sold and bought for the State, the purchase-money being $903.32, which, with interest at 12 per cent. per annum, amounted to $1,224.58. The commissioner also reports that he has good reason to believe that this has been paid to the commissioner of school lands of Logan county, but he cannot report it as so." [It is apparently not easy to trace money when it gets into the hands of that official.] "He reports that the land in Logan county charged as 100,000 acres was sold for taxes in the name of the Pittsburg National Bank of Commerce in 1881, the amount of the taxes being $2,338.20, and was redeemed by the bank; that the amount of taxes on the land for 1882 not paid in Logan county was $475.00."

In view of these facts and the evidence in the record of this cause, the said statement of counsel for defendants is incomprehensible. Double taxes were paid, according to McLure *vs.* Mauperture, up to 1882, for when the land was entered, whenever that was, taxes were charged back to 1863, and paid.

The final order of redemption, set out in full in the statement, contains this provision: "And it is ordered that the clerk certify a copy of this order to the auditor, and also certify, under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment district for taxation."

Here was a specific direction to the clerk to certify the order to the auditor without regard to Randall or his attorney, and the direction to certify to the assessors is also mandatory, Randall or his attorney supervising the matter.

By reference to sections 15, 17, 23, chapter XXIX, of the Code, given at pages 17 and 18 of this brief, it will be seen that it was the duty of the clerk to certify the order to the auditor and to the clerk of the county court, who makes out the land books, independently of this order, and

for the auditor to certify the redemption to the clerk of the county court, and the clerk duly to enter the land on the land books in the name of the redemptioner, for taxation. Why didn't these officers do these things, if they did not? No fault could be charged to the attorney of Randall, now attorney of defendants, except as to the copy to be sent the assessor, and that would not relieve the clerk. If the copy was sent to the auditor, it would get to the assessor through him and the clerk of the county court. If any fault is charged to the attorney, I refer to the supposed case, at page 68 hereof.

At page 9 of brief for defendants in error counsel say: "By an act of April 12, 1852, the same policy was recognized and acted upon by the legislature."

That act was, as I have shown (p. 106), an appendix to the act of 1838, the only act of any effect of the kind. Nothing was forfeited by the act of 1852, so far as known, and it was only directed at certain lands and was not a general act. "This legislation," they say at same page, "continued to be the policy of the State of Virginia until the formation of the State of West Virginia."

This statement has nothing to sustain it. A single act, not of continuing operation, cannot establish a State policy. The act of 1835 exploded July 1, 1836, and killed everything within reach, and was inoperative thereafter. It was not repealed, because it was dead, and its like was never re-enacted in Virginia, and it was not until thirty-four years later that anything like it was enacted in West Virginia, and in the meantime the Fourteenth Amendment was adopted.

The provision of the constitution of 1863, referred to by counsel for defendants in error at page 10, does not bear upon the question, for it does not purport to forfeit anything for any cause, but merely directs the legislature to provide for the *sale* of waste and unappropriated land and land "forfeited to the State of Virginia" for non-payment of taxes and non-entry "for the year 1831 or any year previous thereto, under the laws of the State of Virginia."

When the Fourteenth Amendment was adopted Virginia

had not had a law forfeiting land for any cause but non-payment of taxes assessed, for thirty years, or, counting the act of 1852, for fourteen years, and West Virginia had had none at all. With what force, then, can it be said either that such laws, and especially the present Article, the like of which never existed, were at the time of the adoption of the Fourteenth Amendment the settled policy of either State, or that they were necessary to the administration of the affairs of the State? It is an outrage and an insult to assert that confiscation is a necessity of a State for any purpose. West Virginia got on without such laws from the time of her organization and for years before; but after the close of the war, when half the State was unreconstructed and disorganized; when the amusement of the people of the mountain portions consisted in burning court-houses and indiscriminate murder, with preference for strangers who were rash enough to come among them to claim lands, and the restoration of order was beyond the practical power of either the State or the Federal Government; when the non-resident dared not attempt the assertion of title to his lands and could not attend to the payment of taxes—conditions that have continued but slightly modified ever since—then the opportunity came for one man to steal the land of another under cover and color of a confiscation by the State, and the act of 1868 was passed (p. 10 of brief for defendants in error). It is doubtful what it means, but it doesn't matter; it was after the adoption of the Fourteenth Amendment and is prohibited by it and cannot aid "State usage"—the first act of the kind for a third of a century.

*Wakeman vs. Thompson* (20):

Judge Jackson says: "I am not inclined at this time to question the soundness of that decision."

It was not necessary, for the tax title was defeated on other grounds. The decision referred to relating to the act of 1831, it is hardly to be thought that it was open to question. This has no bearing upon the matter before us.

*Reed vs. Dingess* (p. 21):

Counsel quote from the syllabus: "Lands were forfeited for failure to enter the same for taxation. Const. W. Va., art. 13, sec. 6."

The purpose of counsel is to give the impression that the court so decided, which it did not; and it may bear repeating that the validity of the West Virginia forfeiture law has never been affirmed by the circuit court, except so far as to give the instruction complained of in this case, nor in the court of appeals of the State, but two cases are now pending there for argument this month (January). The use of this brief has been requested by counsel therein.

*Hawkins vs. Barney* (p. 21):

This case is so placed as to mislead. It belongs with what precedes and not with what follows.

*Lasher vs. McCreary* (p. 23):

Here, again, there is no ruling upon the validity of the law. The land had escaped taxation but one year. The facts did not bring the case within the law, valid or invalid.

If Judge Jackson took the view of Article XIII that the counsel wish to imply, he would have given this instruction asked by defendants upon the first trial of this cause and would have taken the case from the jury.

At page 51 counsel for defendants in error suggest that after land is forfeited the owner can bring the fact to the attention of the commissioner of school lands and compel him to bring a suit against the land, and that in such suit the owner can redeem the land. The counsel are mistaken about this. The land-owner has never been conceded to have any power over the commissioner of school lands, nor any interest in the land. The commissioner does not bring the suit, and in a case like the present Buskirk, being a claimant of the land and one of the defendants in the action, would hardly be expected to facilitate a redemption.

But there is one feature that counsel throughout their argument have carefully avoided, and that is the provision which is the whole gist, object, and purpose of the Article, that when land has not been taxed for five years it

thereupon becomes vested, not in the State, but in a lot of intruders. The provision was not and never would be made for any other purpose than for such people to get the land. No one would commit such an outrage upon the law for the benefit of the State. When suit is brought it relates only to the land that is not vested in such claimants. (See sec. 1, page 83 hereof.) In almost any case there would be little or nothing to be redeemed, the land all being transferred to other claimants; but if all this were as the counsel suggest, it would not help Article XIII, for these provisions are not in that article and did not exist when it was adopted, and it makes and contemplates no redemption, but distinctly contemplates that there can be none. The article cannot be made valid by subsequent acts of the legislature. It must work out its own salvation or perish.

It is not true, as stated by the counsel (p. 52), that "these tribunals and the times of their sittings * * * are all provided by law," whatever tribunals are referred to. Suit is not brought unless ordered by the court, and then summons is issued as in other cases; so that the rule stated on page 52, as to notice by statute, does not apply. Article XIII, which is all the court below based its action and instruction upon, contains no notice and provides no notice of anything, and it must do so to be valid. (Fisher *vs.* McGur, 1 Gray, 1; Hibbard *vs.* The People, 4 Mich., 125; Wong Wing *vs.* U. S., 163 U. S., 228; Boggs *vs.* Commonwealth, 76 Va., 989.)

The counsel say (p. 57):

"The State has no ready means of knowing the names and residences of the owners of title."

The statement is absurd. I have set forth the law at pages 16-20, showing how the State has provided the most complete and ready means of knowing every incident in the ownership of land from the time it is granted through every vicissitude and mutation. The land books, properly kept, are a complete history of the title to every tract of land, and the means of keeping land on the books is exemplified in the Rendall decree of redemption lately spoken of.

No. 157.

# In Error

HENRY G. KING, Plaintiff in Error,

vs.

M. B. MULLINS, ALEXANDER McLINTOCK, and JOHN McLINTOCK, Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

**Argument for Plaintiff in Error in Reply to Argument of James H. Peyton, Esq., Filed on Behalf of Certain Persons.**

MATTHIAS F. SPILMAN,
*Counsel for Plaintiff in Error.*

Judd & Detweiler, Printers, Washington, D. C. 10-12-97

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1897.**

*No. 157.*

HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

## Argument for Plaintiff in Error in Reply to Argument of James H. Ferguson, Esq., Filed on Behalf of Certain Persons.

Mr. Ferguson in his argument (p. 2) declares that he is not counsel for defendants in error, was not engaged in the trial in the court below, and only performed such preliminary acts in the case as were conformable with his obligation to the cabal of lawyers organized against this plaintiff in error. In this fact is perhaps found an explanation of his misapprehension of certain things about the case.

It appears to be the hope of counsel for the outsiders, as

well as of counsel for defendants in error, to terrify, if he cannot confuse, the Court and to deter the Court from deciding this cause according to the principles of law that the Court may conceive to govern it, by fear of the effect it is thought by counsel such decision may have upon the interests of his clients. A decision that would defy and confound all existing principles and precedents has no terrors for him, provided his clients be relieved from defending their title or possession as others must do in other states.

If important causes were to be decided by this Court not according to controlling principles of law, but according to the conjectured effect upon persons outside the case, evidence of such effect should be furnished by the record before the Court must ignore the law and guess at the effect of affirming or reversing a judgment. In such case what matter whether statutes be valid or invalid? By what principle or precedent are we to be guided? Surely not by those luminous opinions of this Court that have made it the most august tribunal on earth, for they deal only with the law. How many persons must be advantageously or injuriously affected, and to what degree, to warrant this Court in smothering the Constitution and declaring valid an invalid act or void a valid law? The clamor of counsel, if it were sincere, would amount only to a confession that his clients hold land that they have no hope of retaining unless the State is permitted to transfer to them the title of this plaintiff. It is not to be doubted, however, that at the proper time the people referred to—not a thousand, by the way, but perhaps two hundred, residents, non-residents, and land companies—will promptly avail themselves of the ten-year statute of limitations and be in no worse nor better plight than our fellow-citizens in other states. This is suggested, not because it concerns this Court, but for the comfort it may afford counsel.

## OBJECTIONS TO BILLS OF EXCEPTIONS.

Mr. Ferguson makes some hypercritical objections to plaintiff's bills of exceptions. He objects that the evidence on the part of plaintiff appears to have been "offered" instead of "given." If this evidence had not been "given," defendants would not have been put upon their defense, and this cause would not be here. The trial judge and counsel for the parties were not quibbling when these bills were drawn, agreed to and signed. When the case turned upon the rulings excepted to in these bills of exceptions, other features of the case became unimportant, and it was the purpose of counsel for the parties to take up so much of the record only as would present the decisive rulings of the Court unconfused with other matters, as the rules of this Court require. Plaintiff proved *prima facie* title and right of possession, but the *chain* of title is unimportant to this Court, except so much as explains the application of the instruction of the court below. What the particular evidence was that showed payment of taxes by Randall and *bona fide* purchase without notice by plaintiff, except such notice as the land books gave (if any), is also immaterial to this Court. The bill of exceptions is conclusive upon that point, even upon counsel for the outsiders.

Further objection is made that there was no motion to set aside the verdict. This can hardly be made in seriousness. To move the court to set aside a verdict that the court had instructed the jury to return would be to move the court to stultify itself. It was the verdict of the judge and not of the jury.

These objections counsel for defendants in error have not seen fit to raise, and it does not appertain to counsel for the outsiders to do so. It is quite enough for him to deal with questions that concern his clients and not with those that relate only to the particular judgment before the Court.

PURCHASE WITHOUT NOTICE OF FORFEITURE.

The counsel affects to make light of plaintiff's claim to be a purchaser without knowledge or notice of any alleged forfeiture because the land is in "an old-settled country," but he omits to explain how this fact raises or supports any presumption of forfeiture. It would seem to indicate the reverse. Here, again, the bill of exceptions (No. 5) shows that plaintiff was such purchaser without notice, except such as the land books gave, and that question is concluded. It is not shown and does not appear how the land books could give notice. The record book that the code makes *prima facie* evidence of forfeiture of land and which might be said to give notice of forfeiture, if any record does, contains no record or mention of the land in question. This is the record from which the auditor's certificate put in evidence by plaintiff (Record, p. 30) was made. An effort is made (p. 11) to overcome this certificate and the failure of that record to show any forfeiture or delinquency of that land by the suggestion that, the land not being assessed, it would not be delinquent and might be forfeited and that fact not "come to the knowledge" of the auditor. The supposition that all taxes had been paid would seem to be the most natural explanation of the land not appearing upon the record of forfeited lands or of delinquent lands, and such payment would be the irresistible conclusion to be drawn from such record. I have discussed this point in my previous argument (pp. 86, 87), and I only refer further to the provision of law printed at pages 73 and 74 of Mr. Ferguson's argument, which is as follows:

"In order to enable the auditor to make such record (of forfeited lands) it shall be the duty of the clerk of the county court of each county in which any such real estate ought to have been, but was not entered on the land books and charged with taxes thereon, upon discovering any such failure, to certify the same and all the facts in relation thereto to the auditor."

The clerk of the county court of each county makes up the land book each year, and for that purpose uses the land book of the previous year (see pp. 16 and 17 of my former argument for statute), and he alone and no other person *enters* all land that is entered thereon, and he alone *omits* to enter any land that is omitted, and omits to charge any taxes that are not charged. He must carry all land to the new land book, with such change in ownership, if any, as his record discloses, and if he omits to charge any land he must know it and must report it to the auditor with all the facts in relation to it. The most complete provision for the making of this record of forfeited lands is provided, and when we inspect it we have a right to rely upon it and to assume that it is correct, and that the officers and agents of the State, which is but an ordinary proprietor as to such lands, have performed their statutory duty.

The counsel refers the Court to McClure *vs.* Mauperture, 29 W. Va., 633, in order not only to dispute the bills of exceptions in this case, but to impeach by his present testimony the decree of the court in the case cited. That decree recites that Randall, trustee, "has paid to the plaintiff (the commissioner of school lands) this day in open court all taxes, damages, costs, and interest heretofore unpaid thereon and amounting to $8,000.00." That sum included the taxes for which the land had been sold to the State and such as, but for the sale, would have been charged up to and including the year 1883. Judge Ferguson should have learned from his connection with that case, and he would have learned, if he had been counsel for defendants in the court below, that the taxes on this land from 1838 to the formation of West Virginia and afterwards to the time of these tax sales were paid by Randall and prior trustees, and that therefore Randall's exception to the commissioner's report of taxes back to 1839 or to the formation of the State was well taken and properly sustained. The case was then referred to another commissioner, whose report counsel ignores.

The decree referred to does not, as has been said, require Randall to enter the land on the land books, but directs the clerk to certify copies to the auditor and to the assessors that the land might be taxed again. A writ of *mandamus* could have had no greater force. Randall had a right to suppose that this mandate would be and was obeyed. His loss of two or three hundred thousand acres because the officers of the State, whatever their reason, neglected their duty, does not throw Judge Ferguson into hysterics over the "disastrous effect" of the law—his clients hope to get the land. If they succeed by the grace of this spoliation by the State he will, no doubt, lift up his hands and voice in the pious adjuration, "God save the State of West Virginia!"

MISAPPREHENSION OF THE SCOPE OF THIS CASE.

Notwithstanding the fact that there is no ruling of the court nor any assignment of error in the record that relates to any law of Virginia, counsel ascribes to me the ambitious design to overthrow all the forfeiture laws of Virginia and West Virginia (p. 18), even to the undoing of plaintiff's title, which, he says, rests upon a forfeiture.

There could be no greater misapprehension of the question presented by this case. I have not attacked the Virginia law nor does plaintiff's title rest upon it. Counsel cites the act of March 15, 1838 (see p. 60 of his argument), to show that plaintiff claims under a forfeiture, but it appears from that act that, as the State released its title by forfeiture to the trustee to whom Swan had devised his estate and his heirs-at-law had relinquished their interest, the title took the same course that it would have had there been no forfeiture, which, by the way, was for non-payment of taxes, nor any forfeiture law.

I have raised no question, and there is none before this Court, concerning the validity of the Virginia forfeitures or forfeiture laws. On the contrary, I have in my direct argu-

ment of this case (p. 107 and elsewhere) taken the position that the decisions of the Virginia court upon the act of February 27, 1835, while, in my humble opinion, unsound in law and unsustained by any principle, were nevertheless conclusive, but only as to that act. All the adjudications of the Virginia and West Virginia courts refer to the act of 1835, the only statute of any operation forfeiting land for non-assessment that Virginia ever had—one act in a period of 291 years from 1606 to the present time.

The operation and effect of that statute had been settled long before the formation of West Virginia, and while some of the land that came under its operation afterwards formed part of the territory included in West Virginia, that State did not inherit or succeed to that *law* because it had expired by its own terms and had ceased to exist or to have any operation thirty-six years before the organization of West Virginia. It was no more a part of the existing law of Virginia at that time than were the devises, sheriffs' sales, and other transfers of title by which lands in Virginia had been affected. Whether half the titles of the people of West Virginia date back to forfeitures under the act of 1835 and for non-payment of taxes, as stated by counsel (p. 18), I cannot say, nor is it material, for those titles cannot be affected by the decision herein nor disturbed by any court or by any valid legislation. I have discussed the Virginia law upon my direct argument (pp. 104 to 107) and have pointed out the contrast between it and the provision before this Court and shall not enlarge that discussion here.

It is to be observed that the court below, presumably by design, based its instruction upon "the provisions of the constitution of West Virginia" (Record, p. 31) and not upon the code provision of a similar nature, and I have in my direct argument confined myself to the provision of the constitution and to the *record;* but counsel for defendants in error have embraced the code provisions in their discussion. They are not, however, before the Court and are not con-

nected with the constitution and present no points of difference such as to make an examination thereof profitable or interesting. They are invalid to the same extent as the article of the constitution.

CONCERNING REDEMPTION.

The counsel for opposing interests makes great parade of the act of 1893, providing for sale of waste and unappropriated and forfeited lands (pp. 73–78). No question arose under this statute in the court below and none arises here. It is exhibited to beguile this Court with the false suggestion that one whose lands have been "forfeited" has only to come into court, pay up, and regain his land. Counsel, out of all patience with "such people," says: "All the State asks now of these tax dodgers is to come forward, prove their title, pay what they owe to the State, including costs, and take the lands as far as they have not already been disposed of by the State. *What more can such people ask?*"

"As far as they have not already been disposed of by the State" is spoken very softly, but it is important. It is herein that the oppressiveness of the forfeiture is shown, and it is here that the interests of the gentleman's clients lie.

If the constitution had left room for the State to reinstate the forfeited title by redemption or otherwise, the practical hardship to the owner would have been less, but the legal objection to the forfeiture provision would have been just as insurmountable as it is now; but the constitution, by the very same provision which strips the owner of his title, vests that title (in most cases) in other persons beyond the power of the State, by its legislature or any other agency, to restore it upon any terms. The provision for divesting the owner purports to be self-executing; it precludes the notion of legislative aid to give it effect, and it is obvious that the legislature is powerless, by subsequent statute, to avoid or change or undo its operation. It is only such rags and patches, if

any, of the forfeited tract as are not vested in others, but are left in the State, that the State can provide redemption for. While the legislature is apparently expected to provide a method for selling the forfeited land "the title whereto remains in the State" (sec. 4, art. XIII), no proceedings and nothing but the constitution itself is contemplated to forfeit it.

Independent of the insufficiency and invalidity of the cause for forfeiture, this failure to provide for notice and proceedings is fatal to the validity of this article, and manifestly it cannot be cured or helped by anything the legislature may subsequently do. Being invalid when adopted, it must remain so, and can gain no aid from subsequent legislation.

There is an almost unbroken line of authorities that hold that any law which undertakes to deprive a person of property must *itself* provide for notice and hearing. In addition to the citations contained in my direct argument, attention is invited to the two or three following authorities, which might be multiplied indefinitely.

Loesch *v.* Koehler, 144 Ind., 278 (1895):

A statute of Indiana provided that constables, sheriffs, police officers, or agent of any society for prevention of cruelty to animals might kill any animal found neglected or abandoned, and which, in the opinion of three reputable citizens, was injured or diseased past recovery or rendered useless by age, but made no provision for notice to the owner of such animal. Upon an action against an officer for killing horses under the provisions of the statute, some question was made as to the scope of the statute, whether it applied to animals in use by the owner or only to those running loose, but the court said:

"We take it that it can matter little which interpretation is found to be correct, since upon either view the destruction of the animals is provided for without notice, actual or con-

structive, to the owner. By the fundamental law it is provided that no person shall be deprived of his property without due process of law."

The court below had given an instruction that some notice to the owner was necessary, notwithstanding none was provided by the statute, upon which the court says:

"The action of the circuit court in adding to the terms of the statute, it is conceded, could not remedy the omission from the statute."

The statute was held to be invalid. In the discussion of the case the court says:

"In *State vs. Robbins, supra* (124 Ind., 312), this court said: 'It is fundamental that no person can be deprived of any article, which is recognized by the law as property, without a judicial hearing after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen except in pursuance of some judicial procedure, of which the owner shall have had an opportunity to contest the ground upon which the forfeiture is claimed.'"

Lowry *vs.* Rainwater, 70 Mo., 152:

A statute authorized any judge or justice of the peace upon knowledge or information that any prohibited gaming table or device was kept within his district to cause the same to be brought before him and to be publicly destroyed, but made no provision for judicial condemnation, and the court declared:

"After a careful examination of the 7th section of the act under consideration and numerous adjudications of the courts of other States bearing upon the question involved, we are satisfied that it is in conflict with the 14th amendment to the Federal Constitution, and therefore invalid."

Mr. Lewis, in his treatise on Eminent Domain, sec. 368, after discussing many authorities upon this subject, says:

"There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid."

Counsel for Nighbert and others devotes fifty pages of his argument to a reprint of the laws for assessment and sale of land for taxes from earliest colonial times of Virginia to date, and thereupon makes this observation:

"And now it plainly appears that from 1629 to the present time, a period of 268 years, it has been the 'custom and usage' of the State of Virginia down to 1863, when West Virginia became a State, and of West Virginia from that date to the present, to collect their taxes by distress, a sale of personal property, and by sales of real estate made under statutes passed by the legislatures of both States, and never by judicial process; and if anything can be established by *custom* and *usage* as 'the law of the land,' this manner of collecting taxes has been so established."

On this proposition I quite agree with the counsel, and it appearing that an *assessment* and *sale* of property for taxes has for 268 years met all the exigencies of these States in the matter of revenue, I leave it to counsel for defendants in error to convince him that the same state of facts shows that forfeiture of land *without* assessment or sale is a *revenue* measure, and is "founded in necessity" and "sanctified by long and general usage and consecrated by time."

Yet counsel sets out, it seems, with the notion that article XIII of the Constitution is a tax law, for he asks (p. 18): "What is due process of law in proceedings by a sovereign State in collecting her taxes?" If it is true, as defendants assert, that no taxes have been charged upon the land in question, it would seem to matter little in the present instance what is due process in collecting taxes, since it has no application in a case like the present one; but in my

former argument (pp. 112, 113), to which I refer counsel, I have pointed out certain essentials to due process in such case, tested by which the article before us utterly fails.

### THOSE VIRGINIA CASES.

Since the hope of opposing counsel hangs upon the decisions of the Virginia court of appeals on the act of 1835, which are the only ones in the whole wide range of judicial determination that afford them any comfort, let us look past the syllabi and see what there really is in those cases.

*Staats' Lessee vs. Board*, 10 Gratt., 400; *Wild's Lessee vs. Serpell*, *id.*, 405; *Hale vs. Branscum*, *id.*, 418, and *Smith vs. Chapman*, *id.*, 445, complete the list.

In *Wild's Lessee vs. Serpell* the court holds:

"That the provisions of our statutes" forfeiting land for non-assessment and non-payment of taxes "are within the constitutional competency of the legislature has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staats' Lessee vs. Board*, *supra*, 400; *Smith's Lessee vs. Chapman*, *infra*; *Hale vs. Branscum*, *infra*. The same cases also sufficiently establish" that in order to perfect a forfeiture and divest the title out of the owner and vest it in the Commonwealth, no judgment, decree, inquest of office, or other matter of record is necessary.

There is no discussion of the question, it being decided upon the authority of the cases cited, and to them we must look to see by what authority or upon what reasoning the court decides the statutes to be "within the constitutional competency of the legislature."

In *Smith vs. Chapman*, as said by Mr. Ferguson (top p. 87), "the validity of this act was in no way questioned." Nor was it discussed or decided.

In *Hale vs. Branscum* the whole opinion of the court is contained within the compass of a single page, and that

portion that relates to this question is in the following words and figures, to wit:

"It appearing from the facts found in the special verdict that a patent issued to Nathaniel Anderson on the 25th July, 1798, for 1,000 acres of land lying and being in the county of Grayson; that by virtue of the acts of February 27th, 1835 (Sess. Acts, p. 11), and of March 23d, 1836 (Sess. Acts, p. 7), said tract of land became forfeited for the failure to enter same with the commissioner of the revenue and to pay the taxes thereon in the manner prescribed in the second section of the first recited act. The court, for the reasons assigned in the case of *Staats vs. Board, supra*, 400, is of opinion that the forfeiture was complete on the first day November, 1836."

In "the reasons assigned in *Staats vs. Board*" or nowhere must be found a discussion of the principles or precedents upon which the validity of this remarkable statute is sustained, and to that question the following portion of the two-page opinion of the court is devoted, viz:

"It seems to the court here that as by the 52d section of the act of February 9th, 1814, 2 Rev. Code, p. 546, all previous laws forfeiting lands for the failure to enter them on the books of the commissioners of the revenue were repealed, and no provision was made by subsequent laws forfeiting lands for such failure prior to the act of the 27th February, 1835, Sess. Acts, p. 11, no such forfeiture occurred prior to that time.

"It further seems to the court that as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed until the 1st day of November, 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue and to pay the taxes thereon in the manner prescribed in the 2d section of the act of February 27th, 1835, the forfeiture became absolute from and after the 1st of November, 1836; that the provisions of the act of March 30th, 1837, giving time for redemption until the 15th of January, 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming.

"And it further seems to the court that such forfeiture became absolute and complete by the failure to enter and pay the taxes thereon in the manner prescribed by the act of February, 1835, and no inquisition or judicial proceedings or inquest or finding of any kind was required to consummate such forfeiture."

Not a single "reason" is "assigned," not an authority cited, not a principle of law invoked in all these cases. The promise that was held out in *Wild vs. Serpell* has failed. The broad highway there pointed out has dwindled to a squirrel track, and that track runs up a tree. The *operation* and *effect* of the statute are stated, but, notwithstanding the statement in Wild *vs.* Serpell that it "has been sufficiently affirmed in decisions which have been made during the present term of court" (mentioning the above causes), that the provisions of the statute "are within the constitutional competency of the legislature," the *validity* of that statute has not in express terms been affirmed or passed upon in those cases. The act was simply *treated* as valid by the court and was for that reason so treated by this Court in *Armstrong vs. Morrill*, 14 Wall., 120, relied upon by opposing counsel, this Court having at that time no power to question a State statute for want of "due process" (*Barron vs. Baltimore*, 7 Pet., 247), and if the Virginia court is to be regarded a holding, by implication, that the statute was not repugnant to the State constitution (it was not expressly prohibited by it) that ruling was binding upon this and all other courts. The validity of that act has never been affirmed by this Court nor the West Virginia forfeiture laws by *any* court except in this case in the court below. So when counsel speaks of "the high and abundant authorities, including the many decisions of this honorable Court in favor of their validity" (p. 18), he performs that linguistic operation obscurely described in current slang as "talking through one's hat."

The constitutionality of the West Virginia forfeiture law was raised and argued in the circuit court of appeals, fourth

circuit, in *Read vs. Dingess*, 60 Fed., 26, in 1893 (decided 1894), Mr. Vinson, of counsel for these defendants in error, opposing the constitutionality, and while the court discussed the question somewhat it did not decide it, remarking (top p. 28): "We do not, however, find it necessary to pass upon the question of constitutionality."

The question was again raised and extensively argued two years later in the same court in Buskirk *vs.* King, 72 Fed., 22, but was not decided; and again in the same court in Bartlett *vs.* Ambrose, 78 Fed., 839, this question was fully argued, but the court, merely noting the question (p. 841), disposed of the case upon other grounds, as it had done with the previous cases; and the question comes here now for the first time, with no decision of any court, except the one to be reviewed, in support of the validity of the law, and no principle or precedent to sustain the contention of defendants in error and no "acquiescence" in the operation or invalidity of the provision. In addition to the argument of counsel for defendants in error, which represents not alone the genius and learning of the gentlemen whose names are thereto subscribed, but is a composite of the research of many other able lawyers, I have consented to the filing of the argument of Judge Ferguson to illustrate how little can be brought to the support of this forfeiture law by so learned, so experienced, and so able a lawyer as he.

Whatever may be our opinions of the Virginia forfeiture law, dead thirty years before "the year of grace 1866," or of the decisions of the courts thereon, we must conclude, with Mr. Justice Jackson, then circuit judge, in *Scott vs. Toledo*, 36 Fed., 385, that--

"Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that since that amendment went into effect such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private

property for the public benefit or to public uses without compensation to the owner, and that any attempt to do so, whether done in pursuance of a *constitutional provision* or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, *by taking the property of one person and vesting it in another or the public*, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment."

Concerning the power of the States to take the private property of one person for the benefit of another it has truly been said:

"It was deemed necessary to insert a special provision in the Constitution to enable them to take private property even for public use, but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit for that, but because it was expected that no legislature would be so regardless of right as to attempt it." (*Norman vs. Heist*, 40 Am. Dec., 495.)

SOME ADDITIONAL AUTHORITIES.

It has not been and is not my purpose to reargue this cause, but reference to some recent decisions of this Court may be of value.

*Missouri Pacific Railway vs. Nebraska Board of Transportation*, 164 U. S., 403.

A State statute required railroad company to permit grain elevators to be erected by private persons upon its right of way, and this Court in the conclusion of its opinion epitomizes the law in such case as follows:

"The taking by a State of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is a violation of the fourteenth amendment of the Constitution of the United States."

*Gulf, Colorado & Santa Fé Railway vs. Ellis*, 165 U. S., 150.

Statute of Texas authorizing taxation of an attorney fee as costs against railroad in judgments on certain claims not exceeding fifty dollars invalid.

This Court, speaking by Mr. Justice Brewer, says:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court in Yick Wo *vs.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of purely personal or arbitrary power.' * * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

Tested by these principles the article of the State constitution in controversy cannot be sustained. The classifica-

tion attempted by it is based upon no reasonable ground, no natural and obvious difference between the classes attempted to be made. Only tracts of 1,000 acres and upwards and their owners suffer forfeiture, tracts of less size and their owners in exactly the same situation and predicament being wholly unaffected. Lands pass by devise, descent, and grant, are vested and divested, are valued, assessed, taxed, seized, sold, and in every conceivable manner dealt with by the owner, by the State, and by others in exactly the same manner whether they be of great or small extent, save only in the one respect of forfeiture. Can any reason be pointed out why this selection could not as properly have been made at 900 or 1,100 or 500 or 2,000 acres as at 1,000 acres? To say that "the line must be drawn somewhere" is to admit that it should be drawn nowhere—that the subject is not adapted to the classification sought to be made.

*Chicago, Burlington & Quincy R. R. Co. vs. Chicago*, 166 U. S., 226 (Mar. 1, 1897).

If conclusive authority against the affirmance of the judgment at bar did not exist before, it has been furnished by this Court in the above case since the submission of this cause. In the course of an exhaustive discussion and comprehensive statement of what is due process of law as guaranteed by the Fourteenth Amendment and of the extent to which it reaches, this Court, quoting the statement of Mr. Justice Miller, speaking for the Court in *Davidson vs. New Orleans*, 96 U. S., 97, that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be, and is hereby, vested in another person would, if effectual, deprive the former of his property without due process of law within the meaning of the Fourteenth Amendment, declares:

"Such an enactment would not receive judicial sanction in any country having a written constitution distributing

the powers of government among three co-ordinate departments and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation."

And, further, this Court says:

"But if, as this Court has adjudged, a legislative enactment assuming arbitrarily to take the property of one individual and give it to another individual would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen."

The provision of the West Virginia constitution arbitrarily takes the property of one individual and gives it to another individual, when the latter is available, and when not makes a direct appropriation of it to the State without compensation, without condemnation of the land or the owner, without anything. Both forbidden transactions are performed by one act which this Court declares not to be an exertion of legislative power, but an act of spoliation which cannot receive judicial sanction. It follows that the judgment of the circuit court should be reversed. So may it be.

Respectfully,

MAYNARD F. STILES,
*Counsel for Plaintiff in Error.*

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[redacted]

[redacted]

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1897.**

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*No. 157.*

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HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS ET ALS., DEFENDANTS IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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## SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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Some additional authorities and suggestions are worthy of consideration. In Mattox *vs.* United States, 157 U. S., 243, it is held that "the Constitution is to be interpreted in the light of the law as it existed at the time of its adoption. The rights guaranteed are such as were possessed by the British subject—such as his ancestors had inherited and defended since the days of Magna Charta."

The amendments as they became parts of the Constitution,

though operative only in the future, came under the same rule of interpretation and are equally referable to Magna Charta. Beyond all question, the term "due process of law" in the fourteenth amendment means exactly what it means in the fifth amendment and what "the law of the land" meant in Magna Charta. In each of these due process in the divestiture of title to land means *judicial* process, not a legislative sentence.

If it be suggested that the provision of the State constitution separating the legislative, executive, and judicial departments of government has no application in the present case because the same constitution enacts the legislative forfeiture complained of, it must be remembered that this constitution was adopted after the fourteenth amendment, and that the same provision separating said departments was contained in the constitution of 1863, upon which the State was admitted into the Union, and that the forfeiture provision was not contained in it. It is not conceivable that the State would have been received into the Union with a provision in its constitution so at variance with the long-established "law of the land" and the whole system of our American Government. Beyond doubt a change in such provision, had it been in the constitution, would have been required before receiving the State, as was required in article XI. The State, having been received into the Union and under the Constitution of the United States, the supreme law could no more avoid the letter or spirit of that Constitution by a change in its own than it could by an act of its legislature. Were this otherwise the Federal Constitution could be abrogated or evaded at the will of a State. But the constitution of 1863 prohibiting the exercise of judicial functions by legislative bodies, such exercise was not "due process in the State," nor under State law when the fourteenth amendment was adopted, and could not become such afterwards.

If judicial acts attempted by a State legislature are not due process, though not prohibited by the State constitu-

tion, similar acts attempted by a State constitutional convention, which is purely a legislative body, are not due process. We determine what is or what is not due process by a State, not by reference to its own constitution, but by reference to the Constitution of the United States and Magna Charta

The fourteenth amendment, upon its adoption became not only the law of the nation, but the law of the States as well—supreme and immutable—and thereafter no State had the power to do any act in conflict therewith, either by virtue of pre-existing or subsequently adopted legislation or otherwise. Whatever there was in State constitutions or law repugnant to that amendment was by it repealed, and all attempts at such legislation in the future were rendered inoperative.

In White *vs.* Crump & Shanklin, 19 W. Va., 583 (592), it was held that "before the ratification of the fourteenth amendment to the Constitution of the United States the legislature might, if authorized by the State constitution, divest vested rights of property where such rights were not vested by contract; that since the ratifications of said amendment such vested rights of property can only be divested by a State by due process of law."

When the forfeiture acts of Virginia were passed, there was no fourteenth amendment and no other constitutional restraint upon the power of the legislature in the matter of due process, but that amendment was in force six years before the present constitution of West Virginia was adopted.

### ACQUIESCENCE IN INVALID ACTS.

The chief reliance of defendants in error seems to be upon a pretended general acquiescence in and acceptance of the forfeiture provision and the injury that would now result from declaring it void. Nothing could be more utterly unfounded, in fact, than this claim, and nothing could

be more untenable than the position that, were the facts as defendants in error would have them, that would constitute a sufficient or any reason for giving effect to a void provision.

If the provision in question was invalid at the moment it was adopted, it is impossible to conceive how, being *expressly prohibited* by the fourteenth amendment, it could ever become valid by being *supposed* for any length of time to be valid or by being permitted for any length of time to have effect as if valid. The Federal Constitution can never fall into disuse, die of inanition, or "lie in cold obstruction" while courts are sworn to support it, even though for a time some of the people, from ignorance or interest, forget or disregard its injunctions. How often or how long must a State violate the Constitution to gain the right to do so? How long or how often must a State impair the obligation of contracts, pass bills of attainder and *ex post facto* laws, grant titles of nobility, make treaties, emit bills of credit, make other than gold and silver coin a legal tender, make or enforce laws abridging the privileges and immunities of citizens of the United States, or deprive persons of life, liberty, or property without due process of law, to render its usurpation complete and the Constitution a dead letter, and take from this court the right and duty to declare such acts void? What and how extensive claims of interest under void acts are required to subvert the Constitution and silence this court? If this "forfeiture law" is not a law, but a violation of law, and to declare it such, instead of removing a perpetual source of possible wrong and confusion would be to bring tenfold the result defendants' counsel pretend to foresee, still were it not better that those results should follow than that this court should announce that under any circumstances a State may nullify the Constitution, and that this court cannot or will not prevent it at whatever consequence?

In Mabury *vs.* Madison, 1 Cranch, 176, Chief Justice

Marshall said of a proposition similar to that of defendants in error:

"It would be to declare that an act which according to the principles of our Government is entirely void is yet in practice completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which proposes to restrict their powers within narrow limits."

In Chesapeake & Ohio R. R. Co. *vs.* Miller, 19 W. Va., 408 (421), an act was held unconstitutional that had been re-enacted and been in operation for years, notwithstanding its generally accepted validity and acquiescence in its operation; upon which point the court says:

"The question in such case is, Has a wrong been committed? On page 70 of Cooley's Con. Lim. the author criticises the *ab convenienti* argument used by some courts, but says: 'It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aid in interpretation, and that the cases are not in conflict with the general rules as above laid down. Acquiescence for however great a length of time cannot legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed; and it may be exercised for a long period in violation of the constitutional prohibition before the mischief which the Constitution was designed to guard against may appear, or before any one may be sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.'"

See also De Chartelleux *vs.* Fairchild, 3 Harris (15 Pa., ), 20; *Ex parte Milligan*, 4 Wall., 1.

To give operation to an invalid act divesting titles because it has been treated as valid in affairs or proceedings with which the party finally complaining was not connected and had no opportunity to object would in itself deprive him of property without due process of law.

I have said so much as I have upon this subject, not because either the record or the facts outside the record justify defendants in error in advancing the contention of acquiescence or inconvenience, but because they do in fact urge it.

DUE PROCESS IN COLLATERAL PROCEEDINGS.

If the requirement of due process of law were met by the regularity of a proceeding other than that by which the deprivation is had, that requirement would lose all force, for it would result that no matter by what travesty upon law or justice a man might be imprisoned, he could not be released if the *habeas corpus* proceedings resorted to for that purpose were only in due form; nor by what usurpation of authority, with or without color of law, the vesting of the title to his property in another was attempted, if the subsequent suit by that other to get possession followed established forms. "Due process" applies to the very deprivation, and the want of it cannot be supplied by subsequent independent proceedings. This plaintiff in error was deprived of no property in the action of ejectment, if the instruction of the court was right, for according to that instruction his grantor had been deprived of that property by the Constitution before the suit and before the deed to plaintiff.

In Moore *vs.* Schoppert, 22 W. Va., 282, which was an action of ejectment, it is held that "the charter of a corporation does not expire by reason of acts of omission or commission on the part of the corporation, even where they constitute a sufficient ground for declaring a forfeiture; but the franchise continues in full force until a forfeiture is claimed by the State, and this can only be done in a proper

legal proceeding, by which the cause of forfeiture is ascertained and a forfeiture adjudged." And it is also held that an *ex parte* order of the county court taking charge of so much of the company's property as lies in the county, made without notice, would not, if it were so intended, transfer to said county (which claimed under an act of the legislature), nor divest any right or title of the corporation.

ESTOPPEL OF STATE.

A State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence.

State *vs.* Flint, &c., R. R. Co., 89 Mich., 481; Commonwealth *vs.* Andre, 3 Pick., 224; State *vs.* Bailey, 19 Ind., 452; Cahn *vs.* Barnes, 5 Fed. R., 326–334; Indiana *vs.* Milk, 11 Fed. R., 389, 396, 397; Enfield *vs.* Permit, 5 N. C., 280; Fletcher *vs.* Peck, 6 Cranch, 339; Bigelow on Estoppel, 349; U. S. *vs.* McLochlin, 30 Fed. R., 147 (161, 162); Clark *vs.* United States, 95 U. S., 539.

TAKING OF PRIVATE PROPERTY FOR PRIVATE USES.

I have heretofore discussed article XIII of the West Virginia constitution from the standpoint of its taking the property of one private person and bestowing it upon another. Upon such action the supreme court of West Virginia has spoken. In Warner *vs.* Martin, 21 W. Va., 548, that court says:

"In the first place, all the authorities concur in holding that private property can never be taken without consent of the owner for private use only, either with or without compensation. It is true there is neither in our constitution nor in the constitution of the other States any express provision forbidding that private property should be taken for the private use of another, or any constitutional provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and trans-

ferred to another for his private use without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another without his consent was contrary to the fundamental principles of every republican government, and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power. Such a power as that of taking the private property of one and transferring to another for his own use is not in its nature legislative, and it is only legislative power which by the Constitution is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be a law, but would really be an act of robbery—the exercise of an arbitrary power not conferred on the legislature."

OTHER AUTHORITIES.

The attention of the court is invited to the following cases bearing upon the questions involved in this cause:

Kilbourn *vs.* Thompson, 13 Otto, 168–182; Dodge *vs.* Woolsey, 18 How., 331; Norris *vs.* Doniphan, 4 Met. (Ky.), 385; Concord R. R. Co. *vs.* Greeley, 17 N. H., 55–57; Sullivan *vs.* Oneida, 61 Ill., 242–249; Bowman *vs.* Middleton, 1 Bay, 282; Claybrook *vs.* City of Owensboro, 16 Fed., 301; Davenport *vs.* Cloverport, 72 Fed., 689–693.

Respectfully,

MAYNARD F. STILES,
*Counsel for Plaintiff in Error.*

No. 157.

MAR 25 1898
JAMES H. McKENNEY,
CLERK

Sup. Ct. of Stiles for P. E.

Filed Mar. 25, 1898.

# Supreme Court of the United States.

OCTOBER TERM, 1897.

*No. 157.*

HENRY C. KING, PLAINTIFF IN ERROR,

vs.

M. B. MULLINS ET AL., DEFENDANTS IN ERROR.

## BRIEF ON QUESTION OF JURISDICTION.

MAYNARD F. STILES,
*Counsel for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-25-'98

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1897.**

*No. 157.*

HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS ET AL., DEFENDANTS IN ERROR.

## BRIEF ON QUESTION OF JURISDICTION.

The ground of defendants' objection to the jurisdiction of this court is that the jurisdiction of the circuit court was invoked and depended upon the diversity of the citizenship of the parties, and that the constitutional question upon which the cause was decided was not presented by the declaration, but developed in the progress of the cause. They therefore contend that the cause should have been taken to the circuit court of appeals, whose judgment would be final, and not to this court. In support of this contention counsel cite Colo. Cent. Min'g Co. *vs.* Turck, 150 U. S., 138; Borgmeyer *vs.* Idler, 159 U. S., 408; *Ex parte* Jones, 164 U. S., 691. These cases, however, do not sustain the contention.

The error into which counsel for defendants in error have fallen is failure to note the plain distinction between the matters that confer jurisdiction upon the circuit courts and the matters that give jurisdiction to the circuit courts of appeal or to the Supreme Court upon appeal or writ of error.

The circuit courts of the United States are given jurisdiction, *inter alia*, of causes arising under the Constitution, laws, and treaties of the United States, whether the construction or application of the Constitution is involved, or the validity of the law or the construction or validity of the treaty is drawn in question or not; but in such cases the cause is reviewable in the Supreme Court by direct appeal or writ of error *only* when such construction or application is involved or such validity drawn in question, and it is not necessary to the jurisdiction of the Supreme Court that such question be raised or suggested by the bill or declaration, but it may be raised in subsequent proceeding and by either party. It is enough that when the jurisdiction of the Supreme Court is invoked the record of the cause discloses the constitutional question presented in good faith; that the construction or application of the Constitution was actually "involved" in the case, or that the validity of the law or construction or validity of the treaty was "drawn in question," or that a State constitution or law was claimed (not necessarily upon the face of the bill or declaration) to be in contravention of the Constitution of the United States, which necessarily "involves the construction or application of" that Constitution. If these questions appear in the record the Supreme Court has jurisdiction, no matter when or how they arose. Just as the circuit court may take (or at least formerly could take) jurisdiction upon removal, if at the time removal is sought a Federal question appears, although it did not exist at the commencement of the suit (150 U. S., 143; 128 U. S., 588), so may the Supreme Court take jurisdiction upon appeal, if when the jurisdiction of that court

is invoked the proper questions appear in the case. In other words, the right of the Supreme Court to review the judgments and decrees of the circuit courts by direct appeal or writ of error depends upon *the question involved* and not upon *the ground of jurisdiction of the circuit court.*

In Colo. Cent. Min'g Co. *vs.* Turck no constitutional question arose, for while the law of the United States came into the case, its validity was not challenged. So, too, with Borgmeyer *vs.* Idler, no such question arose, for as the court said: "It is unreasonable to contend that any question was raised directly touching the validity or construction" of the treaties, and of course "the writ of error could not have been entertained," had the case been brought to the Supreme Court. These cases deal with very different questions from the one now before the court, and are entirely consistent with the jurisdiction of the court in the present case.

In *Ex parte* Jones, no Federal question of any kind appeared at any time, first or last. The above cases are foreign to the question before us.

The exclusive jurisdiction of the Supreme Court to review upon direct appeal or writ of error the final judgment or decree of the circuit court "in any case that involves the construction or application of the Constitution of the United States," or "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States," which latter case involves the former, without reference to the time or manner in which such question arose, has been repeatedly sustained by the Supreme Court and by the several circuit courts of appeals from the time of the adoption of the judiciary act of 1891 to the present, and is manifest from the very letter and spirit of that act. Some of the adjudications sustaining such jurisdiction in the present case are the following:

Hamilton *vs.* Bridsdale's Ex'rs, 2 U. S. A., 540; 53 Fed., 753; circuit court of appeals, eighth circuit, from western

district of Texas; action of trespass in ordinary form to recover land. Defendants by plea set up a judgment in proceedings to escheat, and plaintiff claimed that the proceedings and the act of the State legislature upon which they rested were in conflict with the Constitution of the United States. There was no reference in the declaration to the statute, and the circuit court could have had jurisdiction only by reason of diverse citizenship. The writ of error was not sued out until after six months. After noting delay in suing out the writ the court says:

"We notice further that *in the statement of the case*, which is agreed to be correct by counsel for both sides, and particularly *in the assignment of errors*, the case is shown to be one which involves the construction and application of the Constitution of the United States, as well as one in which a law of the State of Texas is claimed to be in contravention of the Constitution of the United States. Under the fifth section of the act of 1891, *supra*, it is provided 'that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case that involves the construction or application of the Constitution of the United States, in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' The sixth section of said act gives appellate jurisdiction to the circuit courts of appeals to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts only in cases not provided for in the fifth section of the act.

"On either or both grounds it is our duty to dismiss the appeal."

World's Columbian Exposition case, 18 U. S. A., 42; 56 Fed., 654, circuit court of appeals, eighth circuit—motion to dismiss appeal for want of jurisdiction—held:

"The appeal was properly taken to this court (circuit court of appeals), as the construction or application of the Constitution was not involved nor the validity of any law of the United States drawn in question."

Chicago, Mil. & St. P. R'y Co. *vs.* Evans, 58 Fed., 433, U. S. circuit court of appeals, eighth circuit, in error to circuit court, N. dist. of Iowa—action against the railroad company for injuries to plaintiff and horses in transportation: "The complaint was in the ordinary form, and in one count therein plaintiff claimed damages both for his personal injuries and for the injuries sustained by his stock." The defendant relied upon a special contract with plaintiff limiting liability, the execution of which plaintiff in his reply admitted, but charged that the contract was void under the State statute. On the trial defendant offered the contract in evidence and plaintiff objected on the ground that the same was in violation of Iowa statute. The objection was sustained and contract excluded. Plaintiff got judgment, and defendant sued out a writ of error from circuit court of appeals. The court says in part:

"The only error assigned which is relied upon for a reversal has reference to the action of the court in excluding the aforesaid special contract, and that ruling is challenged solely on the ground that the Iowa statute above quoted is itself invalid under the Federal Constitution. * * * It will then be seen that the issue presented by the record is whether a law of the State of Iowa is in contravention of the Constitution of the United States, and that is a question which this court is without jurisdiction to decide."

The court quotes the fifth and sixth sections of the act of 1891, and says:

"There is no other provision of law, so far as we are aware, which gives this court the right to hear and determine a constitutional question such as arises in the case at bar." * * *

If there was "no other provision of law," then there was none at all, for the sections quoted give no such right.

The court further held that it was the evident intention of the act of 1891—

"To vest the Supreme Court of the United States with exclusive jurisdiction to entertain appeals and writs of error

for the review of cases which present constitutional questions such as are enumerated in the fourth, fifth, and sixth subdivisions of the fifth section of the act, and the same may be said with reference to the cases mentioned in the second and third subdivisions of the same section.

"In the case at bar the sole question presented for our consideration is whether the Iowa statute contravenes the Constitution of the United States; and, as this court has no jurisdiction to determine that question, especially when it is the sole issue presented by the record, it follows that the writ of error should be dismissed."

Here, again, diversity of citizenship of the parties was the sole ground of jurisdiction of the circuit court, the constitutional question being injected into the case by the defendant.

South Carolina election case, Green *vs.* Mills, 25 U. S. A., 383; 69 Fed., 852; appeal to circuit court of appeals, fourth circuit; opinion by Chief Justice:

* * * "We are of opinion that where the jurisdiction is not in issue, but the question of the constitutionality of a State law is raised and must necessarily be decided in the disposition of the case, there the case on final decree should be taken directly to the Supreme Court."

Hastings *vs.* Ames, 22 U. S. A., 485; 68 Fed., 726; circuit court of appeals, eighth circuit:

The principal and ultimate question was whether or not a State statute conflicted with the Constitution of the United States. The appeal was dismissed for want of jurisdiction. Appeal should have been to Supreme Court.

Barr *vs.* Mayor, etc., of City of New Brunswick, 39 U. S. A., 187; 72 Fed., 689; from district of New Jersey, circuit court of appeals, third circuit; bill to enjoin city and a railroad company from taking complainant's property under the power of eminent domain; bill dismissed; complainant appealed, and defendant moved to dismiss for want of jurisdiction.

The whole opinion is as follows:

"The only question in this appeal is whether the proposed acts of the appellees, the defendants below, under an ordinance of the city of New Brunswick, N. J., would be contrary to and in violation of the fourteenth amendment of the Constitution of the United States, in that the same would deprive the appellant of his property without due process of law. Clearly, the case is one which 'involves the construction or application of the Constitution of the United States' or in which 'the law of a State is claimed to be in contravention of the Constitution of the United States;' and therefore, under sections 5 and 6 of the act 'to establish circuit courts of appeal,' etc., approved March 3, 1891, this court has no jurisdiction to review the decision of the court below upon that question. (McLish *vs.* Roff, 141 U. S., 661; 12 Sup. Ct., 118; Law Ow Bew *vs.* U. S., 144 U. S., 47, 56; 12 Sup. Ct., 517.)

"The motion to dismiss the appeal must be allowed. Appeal dismissed."

It is but fair to state that in this case in the court below (67 Fed., 402) it appears that the constitutional question was disclosed by the bill; but the court of appeals declares in general terms its want of jurisdiction to review the constitutional question, and makes no reference to the manner in which it arose, which is not referred to by the court.

Penn. Mut. Life Ins. Co. *vs.* The City of Austin; decided by Supreme Court January 3, 1898; appeal from decree of circuit court for western district of Texas:

It was argued that in order to give the right of direct appeal to this court "it must affirmatively appear upon the face of the complainant's bill that there was involved in this case a Federal question, the determination of which was essential to a correct decision of the case;" which argument this court disposed of as follows:

"But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that

a law of a State is in contravention of the Federal Constitution."

Bills of exception are a part of the "record;" made so by express terms.

Holder *vs.* Aultman, Miller & Co., decided by Supreme Court January 10, 1898; error to United States circuit court for the eastern district of Michigan:

Plaintiff below, an Ohio corporation, brought an action of assumpsit against Holder, defendant below, a citizen of Michigan, to recover the price of agricultural machines furnished by plaintiff to defendant and sold by him under a contract to sell same and account to plaintiff for proceeds. Defendant contended that the contract was void under the provisions of a statute of Michigan, and the plaintiff "claimed" that the statute was in contravention of the Constitution of the United States, and it was so held. Judgment was given for plaintiff for $5,052.56, and the defendant sued out writ of error from this court.

There was nothing in the declaration to present or foreshadow the constitutional question or any Federal question, and the sole ground upon which the circuit court acquired jurisdiction was diversity of citizenship of the parties. The constitutional question developed in the progress of the case and when defendant interposed his defense and could not aid the jurisdiction of that court.

This court found it unnecessary to decide whether or not the statute was in conflict with the Federal Constitution, because, as it held, the contract did not come within its operation; but the claim of such conflict being made and passed upon in the circuit court, this court held:

"This was, therefore, a 'case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3, 1891."

In none of the foregoing actions at law was the constitutional question presented or suggested by plaintiff's statement of his cause, and the only ground upon which the circuit court could have had jurisdiction when action was brought, was diversity of citizenship of the parties, and in each of them, just as in the case at bar, the State law was brought into the case by the *defendant;* whereupon it was *then* claimed by the plaintiff to be in contravention of the Constitution of the United States.

In many actions at law, under prescribed or customary forms of pleading, it is impossible to present, as a ground of jurisdiction of the circuit court, the question that gives the Supreme Court jurisdiction for direct review, and that question can only develop upon the trial of the cause, in which case, although the constitutional question is the only one to be reviewed, as may well happen, the cause must, if Mr. Conrad is right, go to the circuit court of appeals, which has declared its want of jurisdiction to decide constitutional questions. It would thus result that, there being, according to Mr. Conrad's contention, no direct recourse to the Supreme Court and no jurisdiction in the circuit courts of appeals to decide the question, as they have decided, there could be no review of the decision of the circuit court anywhere. The judiciary act of 1891 contains no such absurdity.

The declaration in this case is the common form, and all the plaintiff is required to state is his estate in the land and the unlawful withholding by defendant, and the latter allegation need not be proven. The only plea permitted is the general issue, "not guilty." (Code W. Va., chap. 90.)

Until the trial nothing is disclosed of the ground of defense, and, while plaintiff may conjecture what that may be, he is not informed by the plea and cannot know, and often encounters a surprise.

It was suggested by counsel for defendants in error upon the argument, that plaintiff might have declared in his

declaration "that defendants claimed title under an invalid State statute," &c., stating the constitutional question as the ground of jurisdiction of the circuit court. Had plaintiff done so, nothing is more certain than that defendant would have defeated the jurisdiction by failing to set up such claim, and as to these defendants in error the allegation would not have been true in point of fact. McClintock claimed title to the De Witt Clinton grant of 142,000 acres, granted in 1796, and whose exterior lines, embracing 182,000 acres, interlock with plaintiff's grant to the extent of upward of 39,000 acres, which plaintiff contended was the 40,000 acres, or part of same, reserved out of said Clinton grant. In any event, the Clinton grant having been forfeited to the State of Virginia under the act of 1835, and never having been redeemed, and no taxes having been paid on the part in interlock since that time, and all taxes having been paid on plaintiff's grant from 1838 to the time of the war and from 1863 to 1883, McClintock could not take the forfeited Randall title, if forfeited, and could not and did not claim title under the constitution or any law, valid or invalid, of West Virginia.

Mullins claimed about 6,000 acres of wild land inside of plaintiff's grant, sold by the commissioner of school lands of Logan county after Randall's redemption in 1883 and before the expiration of five years thereafter, under *ex parte* administrative proceedings for the sale of the "waste and unappropriated lands" of the State. The commissioner had the authority to proceed in the manner he did against lands that were in fact waste and unappropriated: but the land actually sold by him was not waste and unappropriated, nor forfeited under any law, void or valid, nor belonging in any way to the State. The law was not invalid, but was exercised upon land not subject to its operation. Mullins was not in a position to take any forfeited title, and could not and did not claim title under the Constitution or any law of the State of which plaintiff could com-

plain. His claim of title was not old enough to bring him within the operation of section 3, article XIII, of the Constitution, and he had no actual possession of that land; and plaintiff upon the trial renounced claim to the other land of Mullins, of which he had good possession.

The situation of the other defendants in the declaration is not essentially different; but this serves to illustrate that the suggestion of counsel is impracticable. The constitutional question was wholly within the control of defendants to inject it into the case or keep it out by setting up the forfeiture of plaintiff's title or not, as they saw fit. It did not rest with the plaintiff. So the criticism of Mr. Conrad that the plaintiff "did not apprise the defendants of this theory [want of due process] by appropriate averment in his declaration" comes without force. Defendants must be prepared to defend the law upon which they base their defense, and the contention of plaintiff as to the invalidity of section 6, article XIII, of the constitution of West Virginia, if it ever was a surprise to defendants, had ceased to be such during the year and a half plaintiff was trying to redeem in the suits mentioned by counsel for defendants in error before this suit was brought.

The constitutional question came into the case in the only way it could get in. It was the question that disposed of the case in the circuit court; it and the question of evidence by which it was presented are the only ones for this court to decide; it appears upon the record, in the bills of exception "made part of the record," and in the statement of the case and assignment of errors, as was said by the court in *Hamilton vs. Bridsdale's Ex'rs, supra.*

The case is parallel in all essential respects to the law actions above cited, which both the circuit courts of appeals and this court have held to involve the construction or application of the Constitution of the United States and in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States and

of which this court has exclusive jurisdiction and by direct writ of error.

It is submitted that this cause is properly here and that this court has jurisdiction to determine it.

I trust it is excusable at this time, as matter of personal privilege, in reply to supposition of Judge Ferguson (page 33 of his last argument) that Mr. King's purchase of the land in question was upon my advice that the forfeiture law was invalid, to say that I had no knowledge of the existence of either Mr. King or the forfeiture law or the land in question until after his purchase; but had I known them all, I should have advised him without hesitation that the forfeiture law was invalid, but not to trust a dollar of his money in a State that would adopt such laws. Had he known the facts, such advice would have been needless.

I beg also to call attention to Owings *vs.* Speed, 5 Wheat., 420, which I have inadvertently omitted to mention, as showing the power of a State over private property when not restrained by the Federal Constitution, it being held in that case that before the Federal Constitution went into operation a State could impair the obligation of a contract and divest vested rights by act of legislation. So the State could divest vested rights without "due process," if not restrained by its own constitution, before the fourteenth amendment, but not after.

Respectfully, MAYNARD F. STILES,
*Counsel for Plaintiff in Error.*

No. 967. 894

Motion Papers for P. C.

Filed May 4, 1896.

FILED
MAY 4 18
JAMES H. MCKENNEY,
CLERK

# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY C. KING, *Plaintiff in Error,*

*vs.*

M. B. MULLINS, *et als., Defendants in Error.*

**NO. 967.**

**Writ of Error to the Circuit Court of the United States for the District of West Virginia, Fourth Circuit.**

MOTION TO ADVANCE.

# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

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HENRY C. KING, *Plaintiff in Error*,

*vs.*

M. B. MULLINS, *et als.*, *Defendants in Error.*

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**NO. 987.**

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**Writ of Error to the Circuit Court of the United States for the District of West Virginia, Fourth Circuit.**

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## MOTION TO ADVANCE.

This case is a Writ of Error to review a final judgment of the United States Circuit Court for the District of WestVirginia, rendered in an action of ejectment brought by plaintiff in error against defendants in error and others to recover about 300,000 acres of land situate in said District.

The question of law involved is the validity or invalidity of a provision of the constitution of the

State of West Virginia, for the forfeiture of lands and charged to be in conflict with Article XIV, of the Amendments to the Constitution of the United States.

The land in controversy embraces a considerable portion of four counties in said State, in the heart of a region of great undeveloped coal and timber wealth, and was purchased by plaintiff at great cost with a view to development and the establishment of extensive industries; but in the present uncertainty of title is a source of heavy expense, and is subject to constant depredation and spoliation.

About two hundred or more persons and corporations, some occupants of the land, and some non-residents, defendants in this and other suits, are claimants of portions of said land, in tracts ranging from a few hundred acres to many thousand acres each, under interlocking and overlapping grants and many varieties of color of title or without color of title; and the true ownership of the land being uncertain and in dispute, the land is unsalable by either claimant, investment of capital is withheld, the use and enjoyment of the land is limited, the development of the country is retarded, trespass and spoliation of the land facilitated and encouraged, and sacrifice and loss to all lawful claims and interests of all parties occasioned.

The County officers, many of whom are interested adversely to plaintiff, refuse to receive from plaintiff any taxes, even upon the land unclaimed

by others, and many adverse claimants, uncertain of their title, are unwilling to pay, and are withholding, taxes and great loss of revenue to the State results.

The condition of land titles throughout a large part of the State is notoriously one of great confusion and uncertainty, resulting in chief measure from the forfeiture or confiscation laws and the complications arising from them, the validity of which laws is variously asserted, doubted and denied, but has never been passed upon by this Court.

The interests directly concerned in this suit and which will be injuriously affected by delay in the decision thereof, are very great; and numberless other tracts of land, large and small, throughout the State, and the interests connected therewith, will likewise be affected and the rights of parties be determined, by the decision of the Court in this cause, which decision by reason of the wide notoriety acquired by this cause in the Court below and the questions there raised, is awaited generally with interest and anxiety.

The record in the case is very short, and substantially but two questions at the most are presented.

Wherefore Plaintiff in Error, by his counsel, respectfully moves the Court to advance this cause and assign it for hearing at an early day:

First:—Because the questions involved are of general public interest;

SECOND:—Because the decision of this case will be a construction of the Constitution of the United States and of the Constitution of a State, and will determine the rights of a large number of persons and the title to many tracts, and a great area, of land;

THIRD:—Because a speedy determination of said questions will settle much pending, and prevent much future, litigation and will hasten the development of a rich and extensive country.

Notice of this motion has been served upon Defendants in Error, as will appear from proof filed with the Clerk, and defendants are anxious, equally with plaintiff, that this case be advanced.

MAYNARD F. STILES,
*Counsel for Plaintiff in Error.*

No. 499. 157.

Brief of Chilton for D. E.

Filed Jan. 4th, 1897.

# Supreme Court of the United States,

October Term, 1896.

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HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK,

## BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

### STATEMENT OF THE CASE.

ADVERTISER PRINT, HUNTINGTON, W. VA.

# Supreme Court of the United States,

## October Term, 1896.

HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK.

## BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

### STATEMENT OF THE CASE.

On the 23d day of June, 1795, the Commonwealth of Virginia issued a grant to Robert Morris for 500,000 acres of land lying mainly on the Sandy and Guyandot rivers.

Robert Morris conveyed this land in 1797 to James Swan. James Swan went to France in 1815 and undertook to organize a syndicate to colonize this and other tracts of land which he owned, and while he was there became heavily indebted to various persons.

After Swan's death, which occurred in 1830, his creditors assembled and appointed a trustee, one John Peter Dumas, to represent their interest and collect their debts from the estate of Swan. Swan's lands all became forfeited to the State of Virginia under the various legislative enactments hereinafter more fully set out; and he lost his title to the State by his failure to enter the lands upon the revenue commissioner's books and pay the taxes.

All these lands remained forfeited and the title vested in the State until 1838, when the agent of John Peter Dumas, the trustee for Swan's creditors, appeared before the legislature of Virginia and procured a private act to be passed relieving the land from the payment of the back taxes and vesting the title in John Peter Dumas, trustee, for the benefit of Swan's creditors.

Without executing the trust or disposing of the lands, Dumas died and Josiah Randall was appointed trustee in 1846. Josiah Randall failing to execute the trust, or sell the lands, died in 1866, and Robert E. Randall was appointed trustee.

Robert E. Randall resigned in 1866 and John R. Read was substituted as trustee for the Swan creditors. John R. Read sold this tract of land in 1889 to Armstrong and LeMoyne, and they sold it in 1893 to the plaintiff, Henry C. King.

The defendants were in possession at the time of King's purchase under various junior patents from the States of Virginia and West Virginia, some of which had been issued as early as 1840, and one in 1800; and also under various deeds made by the Commissioner of

School Lands for Logan County under decrees of the Circuit Court of that county.

In March, 1895, King brought his action of ejectment against the defendants for the recovery of the land. This action was tried in January, 1896 and resulted in the court directing a verdict for the defendants, upon which verdict a judgment was rendered on the 27th day of February, 1896. It was from this judgment that the plaintiff sued out his writ of error and brought the case to this court for review.

In the trial of the cause it was developed in the evidence that neither King, the plaintiff, nor any of his predecessors in title, had ever listed the land in question for taxation, nor had it entered on the books of the Commissioner of the Revenue for assessment and taxation.

But it did appear that in 1883 there was a pretended redemption of it in the County of Wyoming, when Robert E. Randall owned it. But the then owner did not enter it upon the land books for taxation either for the year 1883 or any subsequent year. Neither did Read, Armstrong and LeMoyne, or King, the plaintiff, have it entered upon the land books for taxation for any year. The land had never been entered on the land books, assessed or taxed since the formation of the State of West Virginia in 1863.

Conceding that the redemption proceedings in Wyoming County in 1883 relieved it from the previous forfeiture, then under the constitution and statutes of the State of West Virginia the land became forfeited and the title vested in the State of West Virginia in 1888, by reason of the owner failing for five successive years since

1883 to have it entered upon the land books and himself charged with the taxes.

If the constitution and statutes of West Virginia are valid the forfeiture became complete in 1888, and the title was divested out of Read, the then claimant, and vested in the state. Read having been divested of all of his title in 1888 by virtue of the laws of West Virginia, he could convey no title in 1889 to his vendees, Armstrong and LeMoyne.

And if Armstrong and LeMoyne got no title from Read they could convey none to King, and when King instituted his suit in March, 1895, he had no title to the property sued for.

The trial court was asked by the plaintiff to rule that the constitution and statutes of West Virginia known as the "non-entry" laws were repugnant to the Fourteenth Amendment of the United States Constitution—on the ground that these laws deprived him of his property "without due process of law."

The court refused this ruling, and held that the "non-entry" laws of West Virginia were not repugnant to the Fourteenth Amendment, and in pursuance of that ruling directed a verdict for the defendants.

The only question presented by the record for this court to pass upon is the constitutionality of the "revenue" laws of the State of West Virginia.

The Revenue system which the plaintiff seeks to have overturned by the judgment of this court, was inaugurated in the State of Virginia in 1790, and has continued to be, with some modifications, the policy of Virginia up to the separation of the two states in 1863, and has con-

inued to be the policy of the State of West Virginia ince that time.

It may not be amiss to refer to this legislation to show ts continued existence from its earliest inception to the resent.

By an act passed on the 27th of December, 1790, the sheriff was required to return lands delinquent for non-payment of taxes which the county court was to certify to the Auditor of Public Accounts.

"By the 5th section of this act the non-payment of taxes on lands for three years divested and forfeited the right to such land and vested it in the Commonwealth, and it then became subject to entry and grant as waste and unappropriated land."

See Hutchinson on Land Titles, Section 7.

By an act of December 17th, 1792, the sheriff was required to return delinquent for non-payment of taxes and like proceedings were to be taken thereon as provided for in the act of 1790.

"In case the tax on any tract of land should be unpaid for three years, the *right* to such land was lost, forfeited and vested in the Commonwealth and was subject to entry and grant as waste and unappropriated land."

Hutchinson on Land Titles, Section 9.

On the 5th of February, 1810, another act was passed, which is as follows:

"Whereas, it is represented to the General Assembly that many persons omit to enter their lands on the Commissioner's books and thereby elude the payment of any revenue tax thereon, *for remedy whereof*, be it enacted, that if any person having title to any tract or tracts of

land in this Commonwealth has failed to enter the same on the Commissioner's books of that county in which the land lies within 18 months after the passage of this act, the same shall be forfeited to this Commonwealth, provided always that the rights of infants, femmes covert and persons of insane memory shall not be affected by this law."

Second Revised Code of 1819, page 533.

By an act passed February 14th, 1811:

"Forfeited lands for non-payment of taxes and non-entry on the land books were to remain the property of the Commonwealth subject to future disposition, but might be redeemed by payment of arrears of taxes and ten per cent. per annum interest on or before the first day of November, 1811."

Hutchinson's Land Titles, Section 16.

Acts of the Legislature, April 1st, 1831, Section 2:

"And all lands, except such as shall be hereafter excepted, returned delinquent for non-payment of taxes thereon for the year 1820, or for any year or years previous thereto, and which shall not have been heretofore redeemed or otherwise exonerated from the payment of the taxes thereon in pursuance of former laws allowing such redemption, exonerated and prescribed in the manner and terms and times thereof, or shall not be redeemed before the first day of January next, in pursuance of the provisions in this section hereinafter contained, and all lands except such as shall be hereinafter excepted, which having been sold for arrears of taxes due thereon, have been redeemed by the executive in pursuance of the act passed the 20th day of February, 1817, entitled, An Act to Amend the Several Acts Concerning Arrearage of Taxes on Lands, Houses, and Lots, and which shall not have been heretofore by or in the original proprietor, by payment into the Treasury the money paid by the executive for the redemption thereof with damages thereon according to law, or shall not be redeemed by the first day of January next in pursuance of the pro-

visions of this section hereinafter contained, shall be and the same are hereby declared to be from and after the first day of January next, *absolutely forfeited and shall be thenceforth, forever irredeemable*, and all such lands and all right, title and interest to and in the same of all and every person or persons in whose name or names the same are returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them shall be thenceforth and the same are hereby absolutely vested in the President and Directors of the Literary Fund * * * * * * * * *"

An Act of the Legislature passed February 27th, 1835:

"And, whereas, it is known to the General Assembly that many large tracts of land lying west of the Alleghany Mountains which were granted before the first day of April, 1831, never were, or have not been for many years last past, entered on the books of the Commissioner of Revenue where they respectively lie, by reason whereof no forfeiture for the non-payment of taxes has accrued or can accrue under the existing laws, the Commonwealth is defrauded of her just demands and the settlement of the country is delayed and embarassed. For remedy whereof, be it further enacted that each and every owner or proprietor of any such tract or parcel of land shall on or before the first day of July, 1836, enter or cause to be entered on the books of the Commissioner of Revenue for the county wherein any such tracts or parcels of land may lie, all such lands now owned or claimed by him, her or them through title derived mediately or immediately under grants from the Commonwealth, and have the same charged with all the taxes and damages for arrears as are properly chargeable thereon, and shall actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the Act concerning delinquent and forfeited lands, passed March 10th 1832, had they been returned delinquent for their delinquency prior to the passage of that act, *and upon their failure to do so, all such lands or parcels thereof not now in actual possession of such owner or proprietor by himself or his tenant in possession, shall become forfeited to the Commonwealth after the first day of July, 1836, except only as hereinafter excepted.*"

In the year 1838 the Legislature of the State of Virginia passed a special act with reference to the lands

owned by James Swan, who was the former owner of the tract of land now claimed by the plaintiff, H. C. King, and which was included and embraced within the purview of this act. The act reads as follows:

"And, whereas, James Swan, of the City of Boston, died, seized of various tracts and parcels of land in this Commonwealth, lying west of the Alleghany Mountains, which has been forfeited to the President and Directors of the Literary Fund, or to the Commonwealth; and, whereas, the said James Swan, by his last will and testament did direct that that his estate, real or personal, should be first charged with the payments of his just debts, which estate, the personalty being of no value whatever and wholly inadequate to the liquidation thereof; and, whereas, it is represented to the General Assembly that the debts of the said estate are chiefly due to the officers of the French Army who were in the American service during our Revolutionary struggle, or the descendants of such officers, and originated in France after that period by loans and advances made under the promptings of a generous regard for an American citizen and fellow soldier; and, whereas, the heirs of James Swan, impressed with the obligations of their ancestor to the said creditors, released to them all their interest in said estate, and the creditors, in order to realize such portion or amount due thereon, have placed the subject in the hands of John Peter Dumas, whose agent now here, believing the interest of the creditors will be consulted by abandoning the lands aforesaid if the taxes and damages thereon shall be exacted for their redemption, appeals to the liberality of the General Assembly for their remission. Therefore, be it further enacted, that all the right, title, and interest of the Commonwealth, or of the President and Directors of the Literary Fund to any of the lands owned by James Swan under titles, legal or equitable, lying west of the Alleghany Mountains, and which have been forfeited to the Commonwealth or the Literary Fund for the non-payment of taxes charged thereon, or for failure to enter the same upon the books of the Commissioner of Revenue, and having the same charged with all the taxes chargeable thereon, and paying taxes thereon with damages as prescribed by law, shall be and the same are hereby transferred to and vested, except as hereinafter excepted, in John Peter Dumas in trust for the creditors of James Swan, discharged from all taxes or damages charged or chargeable thereon

before the first day of January, 1838. Be it further enacted, that the said John Peter Dumas shall be authorized to hold said land for the use and benefit aforesaid, and that any sale made by him or his legally constituted attorney in fact of any part or parcel thereof shall be valid and sufficient to convey the title with which he is hereby invested, provided, however, that nothing in this or the preceding section shall in anywise affect the right or title of any bona fide occupant whose rights are secured by any pre-existing law. Be it further enacted, that the second section next preceding shall in no wise affect any parcels of the said land in said section specified now in the actual possession of any bona fide occupant holding mediately or immediately under grants from the Commonwealth, and upon which parcels of land embraced in such grants taxes shall have been so paid from the emanation thereof, that no forfeiture shall have accrued thereon either to the Commonwealth or to the President and Directors of the Literary Fund, but in such cases the title of the Commonwealth shall be and the same is hereby transferred to and vested in the bona fide occupant to the extent of his possession of the said grant, and such bona fide occupant in any action brought against him, her or them for the recovery of such land in his or her possession as aforesaid shall have the full benefit of the title of the said President and Directors or the Commonwealth hereby intended to be transferred to him, her or them."

By Section 1 of the acts of 1841, the Legislature treats the forfeiture for non-entry upon the Land Books and having the owner charged with the taxes as in full force and effect.

Hutchinson's Land Titles, Section 204.

By an act of April 12th, 1852, the same policy was recognized and acted upon by the Legislature.

Hutchinson's Land Titles, Section 223.

This legislation continued to be the policy of the State

of Virginia until the formation of the State of West Virginia.

In the first constitution of West Virginia in 1863, Article 9, Section 3:

"The Legislature shall provide for the sale of all lands in this state heretofore forfeited to the State of Virginia for the non-payment of the taxes charged thereon for the year 1831, or any year previous thereto, or for the failure of former owners to have the same entered on the Land Books of the proper county and charged with the taxes due thereon for the said or any year previous thereto under the laws of the State of Virginia, and also of all waste and unappropriated lands by proceedings in the circuit courts of the counties where such lands are situated."

An act of the Legislature of the State of West Virginia, 1868, reads as follows:

"It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor and charged with the state taxes thereon not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, and released paid or in any manner discharged which will or shall remain properly chargeable thereon. When any person owning any real estate has not, or shall not have for five successive years, been charged on such books with such taxes and such real estate, the same and all the title, right and interest of the said owner, legal or equitable thereto, shall without any proceedings be absolutely forfeited to and vested in this state * * * *"

Article 13, Section 6, of the constitution of the State of West Virginia, reads as follows:

"It shall be the duty of every owner of land to have it entered upon the land books of the county in which it, or a part of it is situated and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more shall not have been charged upon such books with state tax on said land, then by operation hereof the land shall be forfeited and the title thereto vested in the state * *"

This is the same provision which is now the constitu-

tion of the State of West Virginia. This provision of the constitution has been followed and re-enacted by the Legislature of West Virginia, by the acts of 1872 and 1882. See Code of West Virginia of 1881, Chapter 31, Sec. 39, which reads as follows:

"It shall be the duty of every owner of land to have it entered on the land books in the county in which it or a part of it is situated and to cause himself to be charged with the taxes thereon and pay the same. When for five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with the state tax, the said land then by the operation of law and without any proceedings therefor, the land shall be forfeited and the title thereto vested in the state * * *"

It is this section of the Code of West Virginia and the constitutional provision upon which it is based that the plaintiff claims is in conflict with the Fourteenth Amendment of the Constitution of the United States, that is the latter part of that Amendment which reads as follows:

"* * * * nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of law."

This contention upon the part of the plaintiff brings before this court the construction of the laws of the State of West Virginia, with reference to their being opposed to the guarantees set out in this provision of the Constitution of the United States. They claim that these forfeiture statutes of West Virginia take their property and vest the title of it in the State without due process of law, and is therefore contrary to the Fourteenth Amendment of the Constitution of the United States and null and void.

For more than seventy years the legislature of Virginia has assumed the right to forfeit lands by reason of the owner's failure to have them entered on the Commissioner's Books for taxation. For more than thirty years this same policy has been pursued by the State of West Virginia through its constitution and legislation based upon that constitution. The validity of this legislation has been time and again upheld by the courts of last resort, not only in the two states of Virginia and West Virginia, but in the Federal Courts as well. The first case arising was in 1853, Wilds, Lessee vs. Serpell, reported in the 10th Gratt. 408. The syllabus reads as follows:

"First, the statutes of Virginia forfeiting lands to the commonwealth for the failure of the owners to enter them upon the Commissioners' Books and pay the taxes due thereon are constitutional.

"Second, the forfeiture under the statutes is perfected without a judgment, decrees or other matter of record or of inquest of office, but by the operation of the statutes the title is divested out of the owner and vested in the commonwealth."

Judge Lee in delivering the opinion of the court says:

"That the provisions of our statutes from time to time, making it the duty of owners of lands to pay all taxes, properly chargeable thereon, and where they have been omitted from the books of the commissioners of revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law; and in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default (under the modifications and restrictions provided by the acts), are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under the several statutes. (Staat's Lessee v. Board, *supra* 400; Smith's Lessee v. Chapman, *infra*; Hale v. Branscum, *infra*.) The same cases also sufficiently establish that in order to consummate and perfect a forfeit-

ure in such a case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, of their own forces and by their own energy, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the commonwealth without any proceeding of record, or anything in the nature of an inquest of office. And as the title is thus in a proper case divested out of the owner and vested in the commonwealth by the operation of the statutes, so where the forfeiture ensures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is in like manner perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar conditions of things in that part of the state lying west of the Alleghany Mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable."

The same learned judge, in Levassor v. Washburn, 11 Gratt., 581—583, repeats the doctrine that the forfeiture under this legislation, is absolute and complete without office found, thus:

"The act of the 27th of February, 1835, Sess. Acts, p. 11, declaring that lands that had been omitted from the books of the commissioners of revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same, except such as might be released by law, was intended by its force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding of finding of any kind, in order to consummate it. It was perfectly within the competency of the legislature to declare such forfeiture and divest the title by the mere operation of the act itself, and the whole legislation upon the subject of delinquent and forfeited lands, plainly manifests the intention to exercise its power in this form. By the fourth section of the Act of March

6, 1827, Supp. Rev. Code, 1819, p. 314, the title to lands vested in the Literary Fund for non-payment of taxes and not redeemed, is transferred in certain cases to those who may have settled and improved them under title claimed under grant from the commonwealth. The language of the act is, 'that all right, title, etc.,' (of the Literary Fund) 'shall be and the same is hereby relinquished to and vested in such a person, etc.' By the second section of the Act of April 1st, 1831, Supp. Rev. Code, p. 345, certain delinquent lands and lands sold and theretofore redeemed by the executive under a previous act, which should not be redeemed by a certain day, were declared to be forfeited. The language of the act is, 'shall be from and after (the day named) absolutely forfeited, etc.'—and such lands, etc., shall be henceforth and the same are hereby absolutely vested in the Literary Fund. The eighth, ninth and tenth sections of the same act for transferring the title to certain forfeited and escheated lands to persons in possession under other grants in certain cases; and by the eleventh section, a mode is provided by which the occupant is to obtain a decree on petition to the proper court, investing him with title. But by the act of March 10, 1832, the proceeding is dispensed with, and the title immediately vested by the operation of the act. Its language is, 'all such lands, etc., shall be and the same are hereby declared to be absolutely vested in such holder, and as to those not yet forfeited, immediately after the forfeiture, etc.; and such holder in any action brought against him for the recovery of such land, shall have the full benefit of the commonwealth's right hereby intended to be transferred to him.' The Act of February, 1835, in similar language forfeits omitted lands, if not assessed and the taxes paid, after the 1st of July, 1836; and the title thus vested in the commonwealth is transferred to and absolutely vested in any person in possession claiming bona fide under a grant bearing date previous to the 1st of April, 1831.

"All these provisions, and those of similar character in other acts, would seem to be utterly incompatible with the idea of an inquest of office, or any such proceeding, being necessary to consummate or give effect to the forfeiture.

"I think there is little aid to be derived from construing these statutes from the common law doctrines in relation to the forfeiture of lands for crimes, to the crown. These acts were designed to remedy certain evils, from which prompt, summary and decisive measures were indispensable. They were intended to perform the office

and perfect the remedy proposed by their own mere force and operation. Where, by statute a forfeiture of goods is created, the property, by the forfeiture, is divested out of the owner without any proceeding on the part of the state, and becomes vested in the government. Coke Litt., 128; Wilkins v. Despard, 5 T. R., 112; Fontaine v. Phoenix Ins. Co., 10 John R., 58; Kennedy v. Strong, 14 John R., 131. Where it is of lands the same rule should prevail if such is the plain intention of the legislature. See Barbour v. Nelson, I. Litt. R., 60. Even at common law, though lands or goods forfeited for treason or felony, could not be seized in the King's hands, nor granted by him to another, before attainder, yet the forfeiture of the lands relates to the time of the offense, to avoid all subsequent sales and incumbrances; otherwise as to goods. Coke Litt., 390 b.; Hales Pl. C., 264; 4 Com. Dig. 'Forfeiture', (B. 6) p. 412; Ibid, p. 413, and note u; 4 Bac. Abr. 'Forfeiture' D., p. 346."

The same conclusion is affirmed in the following Virginia case:

Staats v. Board, 10 Gratt., 400.

Hale v. Branscum, Id., 425.

Smith v. Chapman, Id., 445.

Flannagan v. Grimmet, Id., 425.

Usher v. Pride, 15 Id., 190.

To the same effect are the decisions by the Supreme Court of West Virginia in Yokum v. Fickey, 37 W. Va., p. 702, third syllabus, the court says:

"In such cases failure to enter and pay the taxes due on the land and the damages in the manner prescribed in the Act of February 27, 1835, causes the forfeiture to become absolute and complete, and no inquisition, judic-

ial proceedings, or inquest, or finding of any kind was necessary to consummate such forfeiture."

Judge Green in McClure vs. Mauperture, 29 West Va., page 641:

"Our statutes and constitution, like the statutes of Virginia of 1837, not merely create a lien for the taxes on delinquent lands, and without any legal proceedings vest the title perfectly in the state. And even before the adoption of our constitution, which we have seen provided expressly for this, acts so operating have been held constitutional."

Citing the cases in

10 Gratt., Levaszar v. Washburn; 11 Gratt., 572.

Usher v. Pride, 15th Gratt., 190.

Smith v. Sharp, 17th West Va., 221.

Twiggs vs. Chevallie, 4 W. Va., 463.

In such cases the former owner of the land has no more interest in it than one who had never owned it or heard of it.

The late learned Lee, in Wild v. Serpell, 10 Gratt., 408, makes the following general comment upon the acts provided for forfeitures of land:

"That the provisions of our statute passed from time to time, making it the duty of owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the commissioners of the revenue, cause them to be entered thereon in the proper counties, and to be charged with arrearage of taxes and damages, and to pay all such arrearages as shall be found not to be released by law, and in case of failure to do so forfeiting to the commonwealth all right and title

whatever to the parties in default (under modifications and restrictions provided by the acts) are within constitutional competency of legislature, has been sufficiently affirmed in the decisions of this court."

Staats v. Board, 10 Gratt., 400.

Smith v. Chapman, in same book.

Hale v. Branscum, in same.

*Forfeiture, when perfect and complete.* The same cases sufficiently established that, in order to consummate a forfeiture in such a case, no judgment or decree or other matter of record, nor any inquest of office is necessary, but that the statutes themselves, of their own force and by their own energy, work out their own purpose and operate effectually to divest the title out of the defaulting owner, and perfectly vest it in the commonwealth, without the machinery of any proceeding of record or anything in the nature of an inquest of office.

Hutchinson on Land Titles, page 28, Sec. 77 and 78.

Maitland v. McClure, 24 West Va.

"In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of Virginia, now embraced within this state, were in a most wretched and embarrassed condition.

Many cases of owners of large tracts, covering in some cases almost entire counties, would neither pay

their taxes, nor settle and improve their lands, thus
alyzing the energy and contravening the prosperit
the people and the population and advancement of
state to an almost inconceivable extent. In this e
gency and to remedy this calamitous evil, the Gen
Assembly of Virginia inaugurated the system of de
quent and forfeiture laws that form the basis of the
visions of our present constitution on that subject.

The whole history of that system shows a more ear
and determined effort on the part of the legislature,
judiciary and the people speaking through our pres
constitution, to destroy and annihilate the titles of s
delinquent owners, who should, after every reasona
opportunity has been given them to comply with
laws, continue in default and to protect the actual settl
and those not in default. The purpose of the statu
passed to enforce this system, was not merely to creat
lien for the taxes on those delinquent and unoccupi
lands, but to effect by their own force and vigor an ab
lute forfeiture of them and effectually vest the title the
to in the state without the machinery of any proceedi
of record, or anything in the nature of an inquiry of
fice. Such was intended to be and such was, in fact, t
effect of these statutes. The constitutional competen
of the legislature to pass these laws and thus consu
mate the forfeiture and perfectly divest all the right, ti
and interest of the former owner by the operation of t
statutes themselves, has been repeatedly affirmed by t
Court of Appeals of Virginia.)

Staats v. Board, 10 Gratt., 400.

Wild v. Serpell, Id., 405.

Levaszer v. Washburn, II Id., 572.

Usher v. Pride, 15 Id., 190.

See also Smith v. Tharp, 17 W. Va., 221.

In Wild v. Serpell, *supra*, Judge Lee, in delivering the opinion of the court, says:

"Considering the peculiar condition of things in that portion of the state lying west of the Alleghany Mountains, and the serious check to the population and the improvement of the country, and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislatures to enact them was clear and unquestionable."

10 Gratt., 409.

"The title of the land and all the right and interest of the former owner having thus by his default and the operation of the law, become absolutely vested in the state, and become irredeemable, she having thus acquired a perfect title to an unqualified dominion over the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might, in her sovereign capacity, deem proper, without consulting the former owner or anyone else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim or lien upon it than one who had never pretended to own it."

The construction of these identical statutes has time and again received the attention of the Federal Courts.

Armstrong v. Morrell, 14 Wall., pp. 133 and 135.

"Evidence was also introduced by the plaintiffs sho ing that the land in controversy, on the 1st day November, 1836, became forfeited to the state by virt of the second section of the statute of the state, passed on the 27th of February, 1835, as construed the Supreme Court of Appeals of that state. *Forfeitu in such a case became absolute and complete by the fa ure to enter and pay taxes on the land and the damag in the manner therein prescribed, and no inquisition judicial proceeding or inquest or finding of any ki was required to consummate such a forfeiture* * *

"Beyond all doubt the lands described in the deed Robert Morris and others to the grantors of the plai tiffs, became forfeited to the state by reason of the failu to enter the same on the books of the commissioners the revenue, as recited in the preamble of the act of t 12th of February, 1844, in which it is also stated th the grantors of the plaintiffs petitioned the General A sembly for permission to redeem said lands upon the pa ment of all the taxes and damages due thereon."

Wakeman v. Thompson, 35 West Va., Fed. Rep.

"As the title of the former owner was gone, he had r right to be a party to those proceedings or to be hear in reference thereto in the court of the original jurisdi tion or in the Supreme Court of Appeals of this stat His right was simply to redeem within a prescribed tim These principles are decided in McClure v. Maitlan 24 W. Va. I am not inclined at this time to questio the soundness of the decision of the court in that cas and therefore accept it as embodying a sound construc tion of the statutes of West Virginia relating to that sub ject.

"No judicial interposition is required to effect the sal of realty for the non-payment of taxes. It was intende that the statute should execute itself, and it would seem for this reason if no other, that every requirement shoul be strictly complied with. Ought we not to infer tha the legislature, when it declared in its acts that the term upon which realty might be sold when delinquent fo

taxes, that it required all the requirements of the statutes as essential, otherwise it would not have omitted to insert any provision that was not regarded by it as material."

Reed v. Dingess, 1894, 60 Fed. Rep., 21, (1) Syl.

Lands were forfeited through failure to enter the same for taxation. Const. W. Va., Art. 13, Sec. 6:

Held that a deed from the state would not be set aside upon the ground that the complainant had been deprived of his property without due process of law, because the forfeiture in that event would be a nullity, and the complainant has an adequate remedy at law.

In the early settlement of this country (Virginia), says Mr. Justice Johnson:

"The man who received a grant of land failed at first in three, and afterwards in five years, to seat and improve it, was held to have abandoned it. It received the denomination of lapsed land and was declared to be forfeited, and anyone might take out a grant of it."

Hawkins v. Barney, 5 Pet., 457, 458.

Laws *forfeiting* land for failure to enter it for taxation existed in Virginia until 1814, were repealed during that year and re-established by the act of February 27th, 1835.

"The same legislation was enacted in West Virginia almost upon the organization of the state, and has existed until the present day. These laws have since 1835 been sustained in frequent decisions of the courts of the two Virginias, some of them, like that of Staats v. Board, 10 Gratt., 400, elaborately considered, *and they have become, if legislation and long enforcement can make them such, the law of the land.*

"But the main difficulty in these cases appears to be that these tracts do not appear to be upon the tax list at

all. Laws like those of Virginia strike at the root of both of these difficulties. They forfeit the land upon the failure of the owner to have himself charged upon the proper books for taxation, and they vest title immediately in the state, thereby avoiding all questions of validity of title which might otherwise arise upon possible irregularities in assessment, or on proceedings previous to or at the sale. If such legislation can be sustained, it is more effectual than are the more common modes of collecting real estate taxes. But it is contended that such laws are unconstitutional, in this: That they conflict with the Fifth and Fourteenth Amendment of the Constitution of the United States, by depriving persons of their property without due process of law.

"Plaintiff's contention is that he is entitled to require some legal proceeding, upon due notice, and something analogous to a judgment before his title to land can be divested, and that, this manner of proceeding not having been adopted, he has the right to have the deeds given to defendant set aside, as embarassing his right to redeem which he claims is still in existence. *We know of no reason why a forfeiture of title to land for sufficient cause by statute or constitutional legislation is not by 'due process of law.'* It certainly is not that arbitrary exercise of the power of government which Magna Charta intended to prevent when it declared that no person should be deprived of life, liberty or property except by the judgment of his peers or the law of the land.

"The contention that the constitutional provisions, reenacting those of the great charter, require something in the nature of process and judicial proceeding before divesting title, seems inconsistent with accustomed methods of enforcing revenue laws, which are themselves as old as Magna Charta. The objection appears to be, not to the right of a state to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty. All penal legislation does that. It is to declaring the forfeiture complete by the act, without any subsequent legal proceeding.

"But if the act in every case of its commission involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title, as by a proceeding brought by the state to enforce the forfeiture.

"The question is not a new one, and there have been conflicting opinions upon it."

Lasher v. McCreery, 66 Fed. Rep., p. 837, 1895.

Opinion by Jackson, District Judge, concurred in by Goff, Circuit Judge:

"What, then, was the duty of the owner of the land under the act of 1869, when it was omitted from the assessment books? Simply to cause them to be entered upon the proper assessor's book, and charge them with the state taxes thereon not charged to the owner for the year 1832, or any year heretofore, that is prior to the passage of the act, and subsequent to the year 1832, or any year hereafter. That is for any year after the passage of the act, which have not been released and paid and which were properly chargeable to the land.

"This clause of the statute clearly points out to the owner what is required of him. The purpose of the next clause is to punish the owner for his neglect or failure to comply with his duty 'for five successive years.' What duty? Clearly his duty to enter his lands as required by the statute, and charge them with the back taxes, and if he fails to do this for five successive years the penalty of his neglect is the forfeiture of his land. And for what is this penalty imposed? Is it the penalty to enter the lands for one year or the failure to have them charged thereon for five successive years? Certainly the legislature did not intend that the statute should be construed to deprive an owner of his lands for the omission of a single year to enter them on the land books and reclaim the taxes paid both before and after the passage of this act. No such injustice could be imputed to the legislature. Such a construction of the statute would be not only unjust, but might be the means of inflicting great wrong upon an innocent owner. We must assume that the legislature in passing this statute, acted justly and wisely and in a spirit of justice to the delinquent land owner, when it declared that before the owner could be deprived of his land he must neglect to enter it, not for one, two, three or four years, but for five successive years. The language appears to me to be too plain to admit of any other construction.

"The law is well settled that in construing a statute we must ascertain, if possible, the intent of the legislature in enacting it, and to so construe it as to give effect to its intention.

"Looking for the true meaning of this statute and what justly was its owner of any tract of land omitted from the proper assessor's book for a period of not less than

five successive years, should not be deprived of his land by reason of such omission, and that it did not work a forfeiture."

This legislation and the adjudications have become rules of law by which a large proportion of the land titles in both states have been fixed and settled, and now to overturn these rules of property that have been adopted and acquiesced in for more than a century would introduce into our system of land-holdings a never-ending source of litigation and confusion. The upholding of this policy is the only guaranty thrown around thousands of homes and estates, and if it should be destroyed by the decision of this court it would enable all claimants of these ancient titles to come in and assert claims that have lain dormant perhaps a century and more. This was the law before the Fourteenth Amendment of the Constitution came into existence, and this amendment was never intended to make any rules of law, but to preserve the old forms and proceedings unimpaired. Those administrative as well as judicial proceedings that were constitutional before there was any Fourteenth Amendment, was the law of the land and they are none the less since its adoption.

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**Due Process of Law to Be Construed by Established Usages and Practice.**

In State v. Allen, 2d McCord, 56, cited by Judge Cooley in his Constitutional Limitations, page 434, note 4, the Supreme Court of South Carolina says:

"We say that any legal process which was originally founded in necessity, has been consecrated by time and approved and acquiesced in by universal consent must

be construed an exception to the right of trial by jury and is embraced in the alternative law of the land."

In the State v. Mahew, 2 Gill, 448, the court says:

"The power exercised by the General Assembly from the adoption of our Constitution till the present time, a period of nearly seventy years, ought to be deemed almost conclusive evidence of possession by that body.

"Cotemporaneous construction of the Constitution of such duration continually practiced under and through which many rights have been acquired ought not to be shaken but upon the grounds of manifest error and cogent necessity."

In Murray v. Hoboken Land Company, 18th Howard, 277, the court says:

"We must examine the constitution itself to see whether its process be in conflict with any of its provisions. If not found to be so we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of the country. We apprehend there has been no period since the establishment of English monarchy when there has not been by the law of the land a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenue * * * *"

"This legislative construction of the Constitution commencing so early in the government when the first occasion for this manner of proceeding arose, continued throughout its existence and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was due process of law."

Prigg v. Penna., 16 Peters, 621.

United States v. Nourse, 9 Peters, 8.

Randolph's case, 2 Brock, 447.

Nourse's case, 4th Cranch, 151.

"Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment the proceedings authorized by the act of 1820, cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision restraining congress from authorizing such proceedings. For, though due process of law generally implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings; 2d Institute, 47, 50; Hoke v. Henderson, 4 Dev. N. C. Report, 15; Taylor v. Porter, 4th Hill, 146; Vaugaut v. Waddell, 2 Yerger, 260; State Bank v. Cooper, Ibid., 599; Jones Heirs v. Perry, 10 Ibid., 59; Green v. Briggs, 1st Curtis, 311; and yet this is not universally true. There may be and we have seen there are cases under the laws of England after Magna Charta, and as it was brought to this country and acted on here, in which process in its nature final issues against the body of the land and goods for certain public debtors without any such trial, and this brings us to the question whether those provisions of the constitution which relate to the judicial power are incompatible with these proceedings."

At page 282 the court further says:

"The power to collect and disperse revenue and to make all laws which shall be necessary and proper for carrying that power into effect includes all known and proper means of effectuating and dispersing that revenue, unless some such means should be forbidden in some other part of the constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of his debts to the government, and whoever may have possession of the public money until it is actually dispersed the power to use those known and proper means to secure its due application continues. As we have already shown the means provided by the act of 1820, do not differ in principle from those employed in England from remote antiquity and in many of the states, so far as we know, without objection for this purpose at the time the constitution was formed. It may be added that probably there are but few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement to be-

come subjects of judicial controversy according to the course of the law of the land. Imperative necessity has been the distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by the systems of fines and penalties, but always in some way observed and yielded to."

In Hurtado v. California, 110 U. S., 528, the court says:

"The real syllabus of the passage quoted is that a practice of law which is not otherwise forbidden, must be taken to be due process of law if it can show the sanction of settled usage both in England and in this country, but it by no means follows that nothing else can be due process of law. The point in the case arose in reference to a summary proceeding questioned on that account as not due process of law. The answer was, however exceptional it may be, as tested by definitions and principles of the ordinary procedure, nevertheless, this in substance has been immemorially the actual law of the land, and therefore is due process of law."

See also Ex parte Ah Fooke, 49 California, 406.

In Eames v. Savage, 77 Maine, 212, the court says:

"That the statute or oral law, or custom has so long existed unquestioned and has been so often invoked and universally approved and has become ingrained alike in the jurisprudence of the state, is a strong if not conclusive reason pronouncing it constitutional and part of the law of the land."

State v. Allen, 2 McCord, 56.

Sears v. Cottrell, 5th Michigan, 251.

"The words 'due process of law' in the Fourteenth Amendment do not have any enlarged nor different meaning from that heretofore ascribed to them. The amendment does not make federal law and federal pro-

cess of law the law of the land and due process of law in each state. *Whatever was due process of law before the Amendment is due process of law in that state since the Amendment.* And before the Amendment the final determination of the question whether the state statute was according to the law of the land rested with the courts of the state; and since the Amendment it rests with the Supreme Court of the United States. It is through this operation of the Amendment that the citizen receives additional protection against unequal laws."

In Walker v. Sauvinet, 92 U. S. Reports, 92:

"The state cannot deprive a person of his property without due process of law, but this does not nesessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process differing according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine when it is in conflict with the supreme law of the land, that is to say with the constitution and laws of the United States made in pursuance thereof or with any treaty made under the authority of the United States. Here the state court has decided that the proceedings below shall be in accordance with the law of the state, and we do not find that to be contrary to the constitution on any law or treaty of the United States."

See also Minneapolis Railway Company v. Beckwith, 129 U. S., 35.

Bell's Gap Railroad v. Penna., 134 U. S., 239.

Paulsen v. Portland, 149 U. S., 30.

Due process of law and the equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.

McMillen v. Anderson, 95 U. S., 37.

Duncan v. Missouri, 152 U. S., 377.

Giazzo v. Tiernan, 148 U. S., 647.

Missouri Pacific Railway Company v. Mackay, 127 U. S., 205.

Minne Railway Company v. Herrick, 129 U. S., 210.

The police powers of the state remain in all their plenitude as at the time the original constitution was adopted.

Muglar v. Kansas, 123 U. S., 623.

Crowley v. Cristenson, 137 U. S., 86.

Re Kemler, 136 U. S., 436.

Ex parte Converse, 137 U. S., 624.

Leeper v. Texas, 139 U. S., 462.

Lawton v. Steele, 152 U. S., 133.

New York Railway Company v. Bristoe, 151 U. S., 556.

This court has been called upon so often to construe this clause of the Fourteenth Amendment and define the

term, "due process of law," that it would be unnecessary to look farther than to its own decisions for a proper decision of the question now presented: Is the plaintiff deprived of his property without due process of law? The decision of this question necessarily arranges itself under two heads which must be kept in mind in order to avoid confusion. We will consider the cases when applied to, First, *due process of law generally*, and, Second, *due process of law respecting assessments, taxation and the collection of revenue.*

First: Due process of law when applied to the ordinary suits between man and man, either in courts of law or equity, has been given a very different construction from the term, "due process of law" when invoked by delinquents whose taxes are in arrears and who seek to avoid the obligations imposed on them by law to have their property assessed and pay their taxes. As the question presented to this court involves the construction of the land laws of West Virginia respecting the duties of land owners to have their lands entered on the lands books for the purposes of taxation, the discussion will be confined to that particular phase of "due process of law," and we shall not attempt to do more than to offer some definitions of that phrase when used in its *broadest* sense.

Chancellor Kent says: 2d Com.

"The better and larger definition of due process of law is, that it means law in its regular course of administration through the courts of justice."

The word used in Magna Charta, or the law of the land which Lord Coke defines to mean, "the old law of the land."

2d Coke's Institutes, 50.

Davidson v. New Orleans, 90 U. S., 97.

Green v. Briggs, 1st Curtis, 311.

Hurtado v. California, 516.

Judge Cooley says in his Constitutional Limitations, 433:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit, sanctioned under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."

This court has said:

"That kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts."

Ex parte, Wall, 107 U. S., 289.

Mr. Cooley upon his work on Constitutional Limitations says upon this subject:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case. By the law of the land is most clearly intended the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunity under the protection of the general rules which govern society. Everything which he found under that form of enactment was not to be considered as the law of the land. The definition here given is apt and suitable as applied to judicial pro-

ceedings which can not be valid unless they proceed on inquiry and render judgment only after trial."

Cooley's Constitutional Limitations, page 431.

For a more complete and extensive definition of this phrase, "due process of law" we would cite the court to the following authorities:

Cooley's Constitutional Limitations, page 434, et seq.

Bartlett v. Wilson, 54, Ver., page 34.

Ex Parte Wall, 107 U. S., 289.

Hurtado v. California, 110 U. S., 516.

Bank of Columbia v. Okely, 4 Wharton, 235, 244.

In Re Converse, 137 U. S., 631.

Leeper v. Texas, 139 U. S., 462.

Dent v. West Va., 129 U. S., 114.

Missouri Pacific Railway v. Humes, 115 U. S., 519.

Davidson v. New Orleans, 96 U. S., 97.

Geozza v. Tiernan, 148 U. S., 462.

The State v. Allen, 2d McCord, 56.

State v. Mahew, 2d Gill, 448.

Murray v. Hoboken Land and Improvement Co., 18 Howard, 277.

Craig v. Penn., 16 Peters, 621.

U. S. v. Nourse, 9th Peters, p. 8.

Walker vs. Sanvinet, 92 U. S., 82.

Minneapolis Railway Company v. Beckwith, 129 U. S., 35.

Kentucky Railroad Tax Cases, 115 U. S., 321.

Palmer v. McMahon, 106 N. Y., 176, affirmed in Palmer v. McMahon, 133 U. S., 660.

Hagar v. Reclamation District, 111 U. S., 711.

Lent v. Tillison, 140 U. S., 327.

Barbier v. Connolly, 113 U. S., 27.

Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 237.

Mugler v. Kansas, 123 U. S., 623.

Croley v. Christianson, 137 U. S., 86.

Kelley v. Pittsburg, 104 U. S., 78.

Pittsburg v. Backus, 154 U. S., 421.

Spencer v. Merchant, 125 U. S., 343.

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**2. Due Process of Law as Applied to Matters of Assessment, Taxation and the Collection of Revenue.**

Owing to the necessity for a speedy and summary method of collecting revenue, upon which the autonomy of the state itself depends, and in consideration of the duty which every citizen owes to his state to contribute to its support, *the courts have given an entirely different construction to the Fourteenth Amendment, when it is applied to matters of assessment, taxation and the collection of the State's revenue.*

In McMillin v. Anderson, 95 U. S., p. 41, the court says:

"But that does not mean, nor does the phrase 'due process of law' mean by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because that in any view that can be taken of it in the statute under consideration does not violate it. It enacts that when any person shall fail or refuse to pay

his license tax, the solicitor shall give ten days written notice to the delinquent, requiring his payment, and the manner of giving this notice is fully described. If at the expiration of this time the license be not fully paid, the tax collector may with judicial formality, proceed to seize and sell, after ten days advertisement, the property of the delinquent, or so much as may be necessary to pay the tax and cost."

In Davidson v. New Orleans, 96 U. S., p. 104, the court says:

"That whenever by the laws of the state or by state authorities, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirmation or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

In Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 274, the court says:

"The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involved any wrong or unnecessary harshness, it was for the congress, or the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

In Kelley v. Pittsburg, 104 U. S., the court says in the Syllabus:

"Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes, which is established in this country, is within the meaning of the Constitution, due process of law.

"A party is not deprived of his property without due process of law by the enforced collection of taxes merely because they, in individual cases, work hardships or impose unequal burdens * * * It is not asserted that in the methods by which the value of his lands was ascertained for the purpose of taxation, there was any departure from the usual modes of assessment, nor that the manner of appropriating and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued was not due process of law.

"Taxes have not, as a general rule in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of the government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which in regard to that matter is and always has been due process of law."

In Hagar v. Reclamation District, 111 U. S., page 707, the court says:

"What constitutes that process may be difficult to define with precision, so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in Davidson v. New Orleans, to arrive at its meaning 'by gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decision may be founded,' 96 U. S., 97. It is sufficient to observe here that by due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained, and whenever it is necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the depriva-

tion of either without the observance of those general rules established in our system of jurisprudence for the security of private rights.

"Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possesssion of property is involved. But where the taking of property is in the enforcement of tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity for revenue for the support of the government does not admit of the delay attendant upon proceedings of a court of justice, and they are not required for the enforcement of taxes or assessments."

In Hurtado v. California, 110 U. S., the court says:

"Due process of law within the meaning of the Fourteenth Amendment is when the laws bear on each alike and do not subject the individual to an arbitrary exercise of the powers of government."

In Giozza v. Tiernan, 148 U. S., 57, the court says:

"Nor in respect to taxation was the Amendment intended to compel the state to adopt an iron rule of equality to prevent the classification of property at different rates, or prohibit license in that regard, either in the extent to which it operates or the object said to be obtained by it * * * * This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree."

In Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 237, the court says:

"That the provision for the assessment of the tax upon the nominal or face value of the bonds instead of upon

the actual value, was a part of the state system of taxation authorized by its constitution and laws, and violated no provision of the Constitution of the United States.

"That the failure to give personal notice to the owners of the bonds involved no violation of due process of law, when executed according to customary forms and established usages, or in subordination to the principles which underlie them."

The court further in that opinion says:

"As to the assessment of a tax of three mills upon the nominal or face value, of the bonds, instead of assessing it upon its actual value. This might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as a part of the state system of taxation, authorized by its constitution and laws. Then how does it violate any provision of the Constitution of the United States? * * *

"There is no unjust discrimination against any person or corporations. The presumption is that the corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full value; when it is not paid, he pays no tax. But be this as it may, the law does not make any shy discriminations in this regard which the state is not competent to make. All corporate securities are subject to the same regulation. The Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of its laws, was not intended to prevent a state from adjusting a system of taxation in all proper and reasonable ways. It may, if it choose, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of

an unusual character, unknown to the practice of our government, might be obnoxious to constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel that state to adopt an iron rule of equal taxation * * * *"

The general purpose and scope of the Fourteenth Amendment and the general classifications necessary to be applied to it are well stated in Barbier v. Connolly, 113 U. S, 27.

Mr. Justice Field, in delivering the opinion of the court, said:

"The Fourteenth Amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended that there should be no arbitrary deprivation of life, liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights: that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions. As to want of notice to the owners of the bonds, what notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed, and that they will only be required to pay this tax when and as they receive their interest. If the state may assess the tax upon the face value of the bonds, notice in pais is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is taking of the bondholders' property without due process of law. We must confess that we do not see

it in this light. *The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.*"

Lent v. Tillson, 140 U. S., 326.

"For any person interested and who felt himself aggrieved by the action of the determination of the Board as indicated by the report, was permitted at any time within above thirty days to apply by petition to the County Court of the city and county, showing his interest in the proceeding of the Board of Commissioners and his objections thereto, for an order that would bring before that court the report of the Board, together with such pertinent documents or data as were in custody and were used in preparing its reports. Were not these provisions in substantial conformity with the requirements of due process of law, as recognized in the decisions of the courts?"

In Davidson v. New Orleans, 96 U. S., 91, 105, it was said:

"That whenever by the laws of the state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be

said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * As stated by Mr. Justice Bradley in his concurring opinion in Davidson v. New Orleans, in judging what is due process of law, respect must be had to what is the cause and object of the taxing, whether the taxing power, the power of eminent domain, the power of assessment for local investments, or some of these, and if found to be suitable or admissible in the special case it will be adjudged to be due process of law, but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law."

These principles were affirmed in Kentucky Railroad Tax Cases in 115 U. S., 321, and in Spencer v. Merchant, 125 U. S., 345, in the latter of which cases it was said that:

"The legislature in the exercise of its powers of taxation has the right to direct the whole or part of the expense of public improvement, such as the laying, grading or repairing (and equaling and widening) of a street to be assessed upon the owners of lands benefitted thereby, and that the determination of territorial district which should be taxed for local improvement is within the province of legislative discretion; also, that if the legislature provides for the notice to and hearing of each proprietor at some stage of the proceedings, upon the question as to what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

In Pittsburg, etc., v. Backus, 154 U. S., 421, the court says:

"That the constitution of a state authorizes such a method or assessing railroad property, which decision is binding on this court, and that the act gives the railroad companies a right to be heard before final determination of the question, which construction is conclusive on this court, and further: A tax law which grants to the taxpayer the right to be heard on the assessment of his property before final judgment, provides a due process of law determing the valuation, although it makes no provision for a rehearing."

"A sufficient answer to this is that the decision of the Supreme Court of Indiana in this case is conclusive upon

us that the constitution of that state authorizes just the method of assessment adopted in this case. It is contended, specifically, that the act fails of due process of law respecting the assessment, in that it does not require notice by the State Board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of individuals is taken that notice must be given at some time and in some form before the final adjudication. But the difficulty with this argument is that it has no foundation in fact. *The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary.*"

In Kentucky Railroad Tax Cases, 115 U. S., 321, the court says:

"This Board has its time of setting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong, and in the business of assessing taxes this is all that can be reasonably asked."

To the same effect is the case of Missouri Pacific Railroad Company v. Humes, 115 U. S., 519; Leeper v. Texas, 139 U. S., 462.

It is perfectly clear from the foregoing cases that due process of law, when applied to the assessment of taxes and the collection of revenues does not mean a judicial process, where notice is to be given and a hearing must be had. It has not been the practice, nor was it ever intended from the earliest times that taxes should be collected through the courts. To enforce the collection of taxes by the ordinary suits at law, under the forms of the usual judicial procedure, would be in effect to bankrupt

the government and destroy its very existence. The right to seize in a summary way the property of a delinquent and dispose of it for the purpose of raising revenue has always existed in the Sovereign, and the limitations put upon this power, even in those governments having written constitutions, are well defined, and under the most liberal construction in favor of the subject go no further than to require that it be done in the usual way that has been prescribed by the legislature as applicable to all persons alike.

The doctrine as laid down by the Supreme Court of the United States and discussed in the foregoing cases, is:

"*That whenever the legislature has provided a person or tribunal before which all persons feeling themselves aggrieved by the taxing power, may come and be heard, then this is due process of law, no matter how obnoxious it may be in other respects.*"

Has the legislature of West Virginia provided any such tribunal?

The court's attention is specially called to the following provisions in our statute:

Sec. 94, Chap. 29, Code of West Virginia:

"Any person claiming to be aggrieved by an entry in the land or personal property books of any county, or by the assessments of the license tax in any county, may, within one year after the verification of such books, and within six months after the assessment of such license tax, apply for relief to the County Court in which such books are made out, and as to license tax, to the county in which such tax was assessed * * * * * If the court upon an application to correct an assessment under any of the provisions of this chapter, refuse to make the correction asked for, the applicant may have the evidence taken thereon certified by the County Court, and an ap-

peal may be taken as in other cases, from the order of refusal, to the Circuit Court of the county, and such an appeal when allowed by a court or a judge shall, except as hereinbefore provided for, have preference over all other cases pending in such courts."

The County and Circuit Courts have their sittings fixed by law in each county. The Circuit Court must be held three terms and the County Court four, annually in each county.

When the time and place of the settings of a Board or Court is fixed by law at which they are required to hear persons complaining of erroneous or illegal assessments, then no other notice is necessary, and their orders and judgments will be binding and will be considered due process of law.

See Railroad Tax Cases, 115 U. S.

In the State of West Virginia real estate is held upon condition that the owner cause the same to be entered upon the land books, assessed and pay the taxes thereon.

Art. 13, Sec. 6, Constitution of West Virginia:

"It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state taxes on said land, then, by the operation hereof, the land shall be forfeited and the title vested in the state."

Sec. 39, Chapter 31 of the Code of West Virginia:

"It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more shall not have been charged on such books with the state taxes on said lands, then by the operation of law, and without any proceedings therefor, the land shall be forfeited and the title thereto vested in the state."

Sec. 41, Chapter 29 of the Code:

"Every person of full age and sound mind shall list for taxation the property belonging to him, including the shares held by him in any national or other bank in this or any other state, except where the same is listed under the provisions of section sixty-four of this chapter, and the persons and property under his control, subject to taxation, and furnish the assessor, on his application, all necessary information respecting the same."

This condition is a reasonable one, and since it operates on all alike, no one can be heard to complain of it when he has been in default.

Cooley on Taxation, page 39:

"The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislature shall direct, and if the officers intrusted with the execution of laws transcend their powers to the injury of an individual, the common law entitles him to redress.

"But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue. There is no room for the supposition that in a matter of this public importance, where promptness in collection is always desirable and often imperative, dilatory proceedings of this nature were within the contemplation of the people when consenting to any general provision of the constitution."

Sec. 1028, Blackwell on Tax Titles:

"In many states forfeitures for neglect of the owner to list his land or pay his taxes assessed upon it, have been directed by the legislature. This class of forfeitures are based upon the principle that every owner holds his estate upon an implied condition that he will furnish a list of his taxable estate, and promptly pay his share of the common burdens assessed against the entire community, and if he omits to comply with the conditions, and his estate is offered at public vendue, and no purchaser can be found for it, the title is transferred from the owner to the state, the latter being always ready to bid for the land when no other bidder appears.

"Where property is held for the state upon a condition requiring the grantee to perform certain duties respecting the same, and this condition is not complied with, then the title is vested in the state by operation of law without any judicial proceeding therefor in the nature of office found."

U. S. v. Repentigny, 5 Wallace.

"Under the treaty of 1783 with Great Britain at the close of our Revolutionary War, the United States succeeded to all the rights in that part of old Canada which now forms the State of Michigan, that existed in the King of France prior to its conquest from the French by the British in 1760, and among these rights was that of dealing with the seigniorial estate of lands granted out as seignio-

ries by the said king, after a forfeiture had occurred for non-fulfillment of the conditions of the fief. And, under our system, a legislative act, after forfeiture from non-fulfillment of the seigniorial conditions—directing the appropriation and possession of the land—which is equivalent to the "office found" of the common law, is sufficient to complete its reunion with the public domain, and after the concession of six leagues in front of the river at Saut, and six in depth, it provides that the grantees shall hold and possess the same by themselves and cause the same to be held and possessed by their tenants, and cause all others to desert and give up the land, and in default thereof, the present concession shall be and remain null. In the deed of confirmation by the king is the following clause: "That they (the grantees) improve the said concession and use and occupy the same by their tenants. In default thereof the same shall be united to His Majesty's domain." And in a subsequent clause: "His Majesty, ordering that the said concession shall be subject to the conditions expressed without any pretext that they should not have been stipulated in said concession."

"It is argued, however, that according to the customs and usages of France in respect to these conditions of settlement, that no reunion to the royal domain could be asserted except by a judicial determination; that the King was disabled by his own ordinances from decreeing a reunion. We think, upon the proofs in the records, this may well be doubted in the case of such prolonged neglect to conform to the conditions of settlement, as in the instance before us.

It furnishes cogent, if not irresistible evidence of the abandonment of duties and the obligations arising out of the conditions of the grant itself, and invites a direct resumption by the Sovereign, the lord paramount.

But we do not intend to put this branch of the case on this ground. The United States succeeded to all the rights to this territory that existed in the King of France under the treaty of 1783 with Great Britain at the close of the Revolution.

The United States can then become the lord paramount of this seigniory, and were thereby invested with the power to deal with the seigniorial estate the same as the King of France, had it continued under his domain, and we agree that before a forfeiture or a reunion with the public domain could take its place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and the appropriation of the land, is equivalent to "office found." The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the government.

It may be after judicial investigation or by taking possession directly under the authority of the government without these preliminary proceedings. In the present instance we have seen the laws have been extended over this tract, the lands surveyed and put on sale and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a Board of Commissioners and exhibit their claims. This is a legislative equivalent for the reunion of "office found." 11

Every person whose lands have been dropped from the assessment list has his specific and appropriate remedy.

The law imposes upon the owner the duty of having his lands listed when for any cause they have been omitted. At any time within five years after his lands have ceased to be assessed, the owner may apply to the assessor at any time between the first day of April and July in each year, or instead he may have recourse to the County Clerk any day within the five years, and have his lands entered upon the books and saved from forfeiture.

Chap. 29, Sec 39, of the Code:

"The assessor shall begin annually on the first day of April to proceed without delay to ascertain all the persons and property, real and personal, on that day, subject to taxation in his district. The taxes for each year, upon real and personal property, shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others."

Sec. 20, Chap. 29 of the Code.

"Any party may procure at his own cost a certified copy or statement of any deed, judgment, decree or grant, and deliver the same to the clerk of the County Court; and the clerk may examine original deeds, or the records of his or any other county, to ascertain to whom any parcel of land is properly chargeable, or its description or quantity."

Sec. 50, Chap. 31 of the Code of West Virginia:

"Any person owning or claiming any tract of land which has not been entered on the land books of the proper county, or if so entered, has for any cause there-

after been omitted therefrom, may have any part thereof entered on the books of the assessor and assessed with the taxes thereon, and pay the same, as he might do as to the whole tract, specifying the part of the land so entered and assessed, or on which the taxes are so paid, by having the same surveyed and laid off and a plat and description returned to and recorded by the clerk of the County Court, as provided in section thirty-seven and thirty-eight of this chapter. Any such assessment and payment as to such part of any land shall have the like effect as to the same, as if it had been applied to the whole tract, but such entry, assessment or payment shall not prevent a sale or forfeiture of such residue for the failure to cause the same to be entered on the land books and charged with taxes."

Sec. 10, Chap. 29 of the Code of West Virginia;

"When the assessor shall ascertain that there is any land in his district which has not been entered in the land books, or after being entered, has for any cause been omitted for a period of less than five years, he shall make an entry thereof and the name of the owner, in the copy of the land book in his possession, and if there be no assessment of the same, shall proceed to make such assessment to the best of his knowledge, by reference to the assessed value of contigous land similary situated, and shall certify to the clerk of the County Court of the taxes which have been charged or collected, with lawful interest thereon, and the clerk of the County Court shall be governed thereby in making out the land books. Any assessor failing to make such entry and deliver such certificate shall forfeit $20.00; and if the clerk of the County Court make any such discovery, he shall enter the same in the land books and inform the proper assessor thereof, who shall assess the same as aforesaid, and certify his assessment to the clerk, and the clerk shall thereupon charge said real estate with taxes as aforesaid."

If his lands have been omitted from the land books or assessment list for a longer period than five years, the owner can apply to the Commissioner of School Lands, whose duty it is to report the same to the Circuit Court of the county, where a suit will be ordered by the court, in

which the owner can come in and redeem his lands and have them duly entered upon the land books for taxation.

It will be seen by an inspection of the foregoing acts, that the amplest provision has been made for the protection of every land-owner, and instead of our revenue laws being exacting and autocratic, they extend to the delinquent a latitude and leniency to be found, perhaps, in no other state in the union. He is permitted to hold his lands out of the reach of the tax-gatherer for five consecutive years before the state can assert her claim upon his property; he is called upon to pay no taxes during that period, and is yet permitted to hold and enjoy his lands. The law itself notifies him that he will lose his land unless it is listed for taxation, yet it gives him five years in which to list it. He has one of several remedies open to him.

First. He may go to the county assessor and have his land entered on his book.

Second. He can go to the county clerk and have him enter it.

Third. He may go to the County Court and if that court refuses to act on his petition or correct the errors complained of he has his right of appeal to the Circuit Court of the county.

In all the foregoing instances these remedies are open to him any time within five years after his lands have been omitted from the land books, and after he has ceased to pay any taxes thereon, or to be assessed for the same. If, however, his land has been omitted from the land books for a longer period than five years he then can bring that fact to the attention of the Commissioner

of School Lands of the county wherein the land lies and compel him to file a suit against the lands, and in this suit the land owner may come in and pay up the back taxes on his property and have a decree redeeming it from forfeiture and direct it to be placed upon the land books for taxation. These tribunals and the times of their sittings and specific powers and duties are all provided by law, and operate upon all persons and corporations alike without discriminating against anyone.

Sec. 14, Chap. 105 of the Code of West Virginia:

*Where the general statute gives notice of the time and place of the sittings of a board of assessment and the opportunity for appearance or objection, this is all the notice that is necessary to constitute due process of law.*

Lawton v. Steele, 152 U. S., 133.

Weller v. Snover, 42 N. J. Law, 341.

Ely v. Supervisors, 36 N. Y., 297.

Mugler v. Kansas, 123 U. S., 623.

Kidd v. Pearson, 128 U. S., 1.

Dent v. West Virginia, 129 U. S., 114.

N. C. & St. L. R. R. v. Alabama, 128 U. S., 96.

N. Y. Health Department v. Trinity Church, 145 N. Y., 32.

Jones v. Richmond, 18 Grattan, 517.

All recording statutes have been held constitutional, although their effect is to deprive the owner of property without any process of law, or notice.

In Jackson v. Lamphire, 2 Peters, 290, the court says:

"It is within the undisputed province of state legislatures to pass recording acts by which the elder grantee should be postponed to the younger if the prior deed is not recorded within a limited time, and the power is the same whether the deed is dated before or after the recording act, though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser. It is not a law impairing the obligations of contracts. Such too, is the power to pass acts of limitations and their effects. Reason and sound policy have led to the general adoption of laws of both descriptions and their validity cannot be questioned."

To the same effect is

Vance v. Vance, 103 U. S., 514.

Cooley's Constitutional Limitations, page 376.

Story on the Constitution, Sec. 1385.

Koshkoning v. Burden, 104 U. S., 668.

Hawkins v. Barney, 5 Peters, 457.

Sabin v. Watterson, 17 Wallace, 596.

The Statute of Limitations are upheld, although they deprive the former owner of his property without any notice or process of law whatever.

Hawkins v. Barney, 5 Peters, 466.

Hutchinson on Land Titles, p. 199.

Campbell v. Holt, 115 U. S., 623.

The law is, therefore, that the title of one individual may by the adverse possession of another individual be transferred to that other without any hearing or process of any sort. If this be so can it be said that under precisely similar circumstances the title of the individual land owner cannot be transferred to the state without some judicial proceeding to that end? The land owner who fails or refuses to enter his land for taxation for five consecutive years, thereby declining to bear his share of the public burden indicates just as plainly his consent that that land may be transferred to the state as by permitting adverse possession for ten years, he would indicate his consent that the adverse possessor might take title. Or, can it be that the principle which operates against the land owner in favor of another individual can not operate in favor of the state? The reason which is at the bottom of the statute limitations is one of the reasons which underlies the statute forfeiting the land for non-entry; that is, the purpose of quieting titles. It is evident from the latter statute, and is historically known, that one of the ends it sought to accomplish was the set-

tlement of the land titles in the western part of the State of West Virginia, precisely the same sort of considerations as underlies the statute of limitations. It has been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that due process of law as applied to that subject, and does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient.

Kentucky Railroad Tax Cases, 115 U. S., 331.

Paulsen v. Portland, 149 U. S., 30.

McMillen v. Anderson, 95 U. S., 37.

Lieutenant v. Tillson, 140 U. S., 316.

Walston v. Nevin, 128 U. S., 578.

The Constitution of West Virginia, article 13, section 6, gives notice to every person owning land in West Virginia to enter his land upon the land books of the proper county for purposes of assessment, and if he fails to do this for five years his title is forfeited to the state. Here is notice; here is proclamation made. What more can the state do than warn such owner to discharge this duty or else be deemed having no longer any title or claim to the land? The state does not single out the owner of

any particular tract of land. It is not presumed to know the particular owner, his title, or the quantity or location of the land. It asks every one if he has land, or claims it to place it where it may be assessed for taxes. This he can evidently do. He knows best his own title and the extent of his claim, if he has any, and let him come forward and state it; and if he does not do this within the reasonable space of five years how long shall the state wait for its taxes? How long shall property owners baffle and defeat the just claims of government? How long shall contumacy and failure to obey public laws continue to embarass the policy and the government of the state? If a land owner can thus do and escape until judicial proceedings and "the laws delay," slowly reaching this tax in the owner's pocket, so may be the consequences as to all taxpayers. Large tracts of land owned by non-residents, unoccupied, unimproved, uncultivated and in effect abandoned, settled under adverse possession, held for years by bona fide occupants who have made improvements and paid their taxes, in what manner shall the state obtain from such non-residents, or from resident owners who pretend to have title to such land, their just contribution to the support of the government? This was the question that confronted the people of the State of West Virginia. This was the condition which embarrassed the development and progress of the state. The [illegible] whether the forfeiting titles which were not entered for taxation by failure for five years, or to cause them to be so entered, is good or bad, is no longer debatable. That policy is part of the system of their laws, the heritage of the people, and it cannot be doubted that it was the wisest

one to adopt. The Constitution and laws of the State of West Virginia gave notice every day in the year publicly and plainly that every owner must enter his land for assessment and taxation in the proper land book of the county wherein it lies. His omission produces the forfeiture. His failure to comply with the notice of the public law prescribing the duty and the place of its performance is his own act. His own default results in the forfeiture of his title. It is left to his own volition whether he will comply or not. The state has no ready means of knowing the names and residence of the owners of the title. It was not concerned with the title or the character of it. It seeks its revenue. Such title may be held by dozens of different persons located in different states or countries, derived to them by deed or devise, and yet no record may be found or kept in the state of the present ownership of the land. Under such circumstances the state publicly by its people in their constitution calls upon everyone who has title to land within its border to go forward and place upon the book of the proper county the quantity and location of the land. If he fails his title becomes vested in the state so that it may obtain its revenue from these lands in some other way. This is not oppression. It is not tyranny nor robbery. It is simple justice. The Supreme Court has declared this principle in Palmer v. McMahon, 133 U. S., 660, in which it says in effect, that the failure of the tax-payer to use it and to discharge his duty by paying his taxes makes him the voluntary arbiter of his own fate. It is common legislation and constitutional to provide that if a certain thing is done or omitted such penalty or for-

feiture shall be the consequence.

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**How is Forfeiture to Be Proven?**

First. By the Auditor's certificate. Second. The Commissioner of School Lands proceedings.

The plaintiff in his petition for a writ of error assigns grounds that there was no forfeiture proven in the case at bar. In other words that there was no proper evidence submitted to the court and admitted to the jury which shows as a matter of fact that his lands were not on the land books for five consecutive years since the year 1869. Upon this point we cite the court to the certificate of I. V. Johnson, Auditor of West Virginia, which will be found in the printed record at page 30. Under the statute of West Virginia this certificate is made evidence of the facts therein recited.

Chapter 130 of the Code of West Virginia, Sec. 5 :

"* * * * The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands *or of their not having been entered on the books of the assessor of the county or counties wherein the same were chargeable with taxes*, shall, in any suit in relation to such lands, be prima facie evidence of what is stated in such certificate, provided it be filed with the papers of said suit and notice thereof be given to the opposite party or his attorney at least twenty days before the first day of the term at which it is to be offered as evidence. When the certificate purports to be signed by the said auditor, it may be admitted as evidence without proof of his signature."

This certificate was filed with the papers and the notice was given twenty days before the term at which it was offered for evidence and the plaintiff did not attempt to

disprove the facts certified to by the auditor in his certificate. It would appear that the plaintiff has attempted to counteract the effect of this certificate in a certificate which he has filed under Chapter 31, Sec. 39 of the Code of West Virginia. That portion of the section pertinent to the question reads as follows:

"A record of all real estate so forfeited *which shall come to the knowledge of the auditor* shall be kept within his office, in which shall be shown the name of some former owner or supposed owner, the quantity or supposed quantity, and local or other description of the real estate, for what years the owner was not charged with the taxes, and when the real estate became forfeited. Such record shall be prima facie evidence that the owner was not for such years charged with the taxes on such real estate, and that he did not cause it to be entered and charged with such taxes as aforesaid, and that the real estate was forfeited and vested in the state at the time specified. In order to enable the auditor to make such record, it shall be the duty of the clerk of the County Court of each county in which such real estate ought to have been entered and charged with taxes as aforesaid, *upon discovering such failure*, to certify to the auditor all the facts in relation thereto."

For this statute it is intended by the plaintiff to show that his land was not omitted from the land books for five successive years; that is, since 1883 up to the time of the trial, on no other evidence than the fact that it is the duty of the auditor to keep a record of forfeited lands *when the same shall be brought to his attention.* And in order to enable him to make the proper record the clerk of the County Court, *if he discover any such failure* to enter upon the books, then it is his duty to acquaint the auditor with that fact. It will be noticed from an inspection of this statute that the auditor shall keep a copy of these forfeitures only as they *shall come to his knowledge.* It is the duty of the county clerk to bring these matters

to his knowledge whenever *the clerk discovers* that ther has been a non-entry of any lands on the land book o the county; and it necessarily follows that if the audito had no knowledge of the lands in question being omitte from the land books then he was powerless to make an record of it in the book specified in the foregoing statute And if the plaintiff as a matter of fact had had his lan entered upon the land books of the proper county h could have gotten a certificate from the auditor, or fron the county clerk wherein the land lies of that fact, which of course, he failed to do because there was no such rec ord in either the auditor's office or the office of the cler of the County Court, as the lands claimed by him hav not been entered for taxation, nor had it been taxed. Th certificate of the auditor only goes back to the year 1883 because in that year there was a pretended redemption but no subsequent entry of the land upon the land book had been made by the plaintiff or those under whon he claimed.

By an inspection of Chap. 105, of the Code of Wes Virginia whenever a commissioner of school lands shal ascertain that any lands within his county has not bee entered upon the land books for five successive year since the year 1869 it is his duty to report that fact to th Circuit Court of his county, and then the Circuit Cou upon that report ascertains that fact, and after that fac has been ascertained by the court, the court directs a sui to be brought against the land to be sold for taxes. Thi was done in the Circuit Court of Logan county by E. F Buskirk, Commissioner of School Lands, which is desig nated as tract No. 20, at page 26 of the printed record.

As shown on page 16 of the printed record the same proceeding was had by the Commissioner of School Lands for Wyoming county. Speaking of this particular tract of land, on page 17, he says: "It is known as the Robert E. Randall land," and said Commissioner of School Lands makes the following statement in his petition to the court, at the bottom of page 17:

"The said Commissioner of School Lands would further report that it has come to his knowledge from Henry C. King, the present owner and claimant thereof, that a tract of five hundred thousand acres lying principally in this county and partly in the counties of Logan and McDowell, and the greater portion in Virginia and Kentucky, was, at the April term, 1883, of the Circuit Court of this county, redeemed from the former forfeiture by Robert E. Randall, trustee, and all the taxes thereon paid prior to and including the year 1883; that *since said redemption said land has been omitted from the land books of this county for five successive years*, to-wit, for the years '84, '85, '86, '87 and '88, and thereby the same has been forfeited to the state in the name of Robert E. Randall, trustee. The said Commissioner of School Lands further reports that each of said tracts hereinbefore mentioned are liable to be sold for the benefit of the school fund of this state, on account of the forfeiture herein stated," and signed "E. M. Senter, Commissioner of School Lands."

It will be seen from the record of the suit and the report in Wyoming county that the plaintiff in this suit, H. C. King, brought to the knowledge of the Commissioner of School Lands of that county the fact that his lands that he claimed had been omitted from the land books of the county for five successive years, and therefore the title was forfeited to and vested in the state. In this proceeding the present plaintiff acknowledges and recognizes the validity

of the laws which he is here now seeking to have over-
turned, and the evidence adduced by the defendants upon
the question of the omission of the lands from the land
books for five years is conclusive and is not pretended to
be denied. If, then, the omission of land from the land
books of Logan and Wyoming counties for five years op-
erates a forfeiture of the plaintiff's title, then he had no
title at the time that he brought his action of ejectment, for
then the title to his property was in the State of West Vir-
ginia, and this unquestionably follows if the constitution
and statutes of the State of West Virginia are not repug-
nant to the Fourteenth Amendment of the Constitution of
the United States.

Under the practice in the State of Virginia and West
Virginia in an action of ejectment the plaintiff must rely
on the strength of his own title, and it is not a question
of a comparison of titles as it is in some of the western
states. I refer the court to the recent case of Reusens v.
Lawson, decided March 2d, 1895, by the Supreme Court
of Virginia in a very well considered case, reported in
91st Virginia Reports at page 226. In Syllabus 9, the
court lays down this proposition of law:

"In an action of ejectment the plaintiff must recover
on the strength of his own title, and if it appear that the
legal title is in another, whether that other be the defend-
ant, the commonwealth, or some third person, it is suf-
ficient to defeat the plaintiff. If it appears that the title
has been forfeited to the commonwealth for the non-pay-
ment of taxes, or other cause, and there is no evidence
that it has been redeemed by the owner, or re-sold, or

re-granted by the commonwealth, the presumption is that the title is still outstanding in the commonwealth."

To the same effect is the case of Law v. Settle, 32 W. Va., 600.

All of which is respectfully submitted.

VINSON & THOMPSON,

JOHN A. SHEPPARD,

W. E. CHILTON.

# UNITED STATES,

October Term, 1876.

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HENRY C. HUNT, Plaintiff in Error,

vs.

W. S. HOLLAND, ALEXANDER HENDERSON AND JOHN McCLINTOCK, Defendants in Error.

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Argument on Motion to Dismiss or Affirm, for Defendants in Error.

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Gibson Brothers, Printers and Bookbinders, Washington, D. C.

# IN THE

# SUPREME COURT

OF THE

# UNITED STATES,

## October Term, 1896.

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HENRY C. KING, Plaintiff in Error,

vs.

M. B. MULLENS, ALEXANDER McCLINTICK AND JOHN McCLINTICK, Defendants in Error.

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ARGUMENT OF JAMES H. FERGUSON OF COUNSEL FOR DEFENDANTS IN ERROR.

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### Statement.

This was an action of ejectment brought by Henry C. King, the plaintiff in error, against Simon S. Altizer, and about one hundred and twenty other defendants, including the defendants in error, who severed from the other defendants in the trial of said action. Record pp. 1,2 8.

The cause was tried by a jury and a verdict was found by them, as follows: "We, the jury, by direction of the court, find the de-

fendants, M. B. Mullens, Alexander McClintic and John McClintic, not guilty." Record pp. 8 to 11.

And judgement was thereupon rendered by the court in favor of the said defendants. Record p. 12.

The plaintiff, King, thereupon filed five several bills of exceptions to the opinions and rulings of the court on the trial of this cause. Record pp. 12 to 32, inclusive.

And on the 20th day of March, 1896, the plaintiff in error filed his petition in said court, assigning errors in the judgment of the court so rendered as aforesaid, and praying a writ of error thereto, which was allowed, and the case is now in this Honorable Court upon the said writ of error. And the decision of the case here, in my view of it, turns upon the question,

*Did the court below err in instructing the jury to find a verdict in favor of the defendants?*

And the decision of this question involves two others (1) Did the plaintiff in the trial below. prove facts sufficient to entitle him to a verdict in his favor, in the absence of proof by the defendants to the contrary, and (2) Did the facts proved by the defendants in said trial show that the plaintiff had no title to the 500,000 acres of land in question at the time of the commencement of this action, and that the title to said tract of land, at that time, was in the State of West Virginia, by forfeiture?

It is claimed by the plaintiff that the provisions of the constitution and the statutes of West Virginia, forfeiting lands for the failure of the owner thereof, for five successive years after the year 1869 "to have it entered on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same," are in violation of the Constitution of the United States, and of the fourteenth amendment thereof. This Constitutional provision and the legislation of the State of West Virginia, is but a continuation of the legislation of Virginia from the time she was organized as a colony under the charter granted by James the *first*, King of England in 1606, to June 20th, 1863, when West Virginia, formerly a part of Virginia, became a State of this Union. The first charter so granted as aforesaid, was by letters patent to Sir Thomas Gates, and others dated April 10, 1606. And section fifteen of that charter reads as follows:

"Also we do, for us and our heirs and successors, decree by these presents, that all and every the persons, being our subject,

which shall dwell and inhabit within every or any of the said several colonies and plantations, and every of their children, which shall happen to be born within any of the limits and precincts of the said several colonies and plantations shall have and enjoy all the liberties, franahises and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born within this our realm of England, or any other of our said dominions."

The first regular Legislative Assembly called the General Assembly, and sometimes the "Grand Assembly," held in Virginia under this charter, met on the 16th day of October, 1629, at which these were present, "John Pott, Esq., Governor, Captain Roger Smith, Captain Samuel Matthews, Mr. Secretary Claybourne, Mr. William Farran," and forty-five Burgesses from the several political divisions of the colony.

This General Assemby passed but few acts, and the dates of their passage are not given as we give them now. They are found in Hening's Statutes at Large for each year, commencing with October. 1629, Vol. 1, p. 142. And the only indication we have of the time of the passage of an act in that day and time, taking the session above alluded to as an example, printed in large capitals at the head of the page, thus:

OCTOBER 1629– 5th James 1st.

At that time the currency of the colony was principally *tobacco*, and the sixth act passed at that session was for the payment of several large claims due by the government to sundry of her citizens, and for the payment of which, the act provided, as follows:

"To defray all the charges above said," the whole assembly concluded that there should be five pounds of tobacco per pol levied through the colony. And it was further concluded and ordered that every master of a family, and every freeman that is to pay five pound of tobacco per pol as aforesaid for the defraying of the publique charges, shall bring the same unto the Houses of the Burgessess of the plantations within two days after notice thereof given unto them. And if any shall fail to bring in the same, it is thought fit that by virtue of this order the said Burgesses shall have power to levy the same by distresse upon the goods of the delinquents, and to make sale of the said goods, and to detain such tobacco which shall be due by this order, and for their fees in making this distresse, restoring to the owner of the said goods the iresdue and remainder. And if the Burgesses shall make neglect

herein they shall be fined by the Governor and Council." Vol. I. p. p. 142-3. Thus it will be seen that while the members of this General Assembly were not experts in the preparation of ~~statistics~~, they provided in this, their first act, for the collection of taxes by the summary remedy of distress and sale. And the principal question I propose to discuss in this case is,

*What is due process of law, in proceedings by a State, for the collection of her taxes?*

Judge Cooley in his Constitutional Limitations, 2nd Edition, p. 356, says:

"Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." And in a note at the foot of the page, he refers, with approval, to the case of Wynehamer v. People, 13 New York, 482, per *Selden*, J., in State v. Allen, 2 McCord, 56, the Court, in speaking of process for the collection of taxes, say:

"We think that any legal process which was originally founded in necessity, and has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'"

And I maintain that the legislation of Virginia, commencing with this first act above quoted, and continuing in the same line down to the creation of the State of West Virginia, in June, 1863, and by the constitution and statutes of West Virginia to this time, *do constitute due process of law for the collection of taxes, and are*, "*the law of the land*" for that purpose.

And the attention of the Court is respectfully called to the following additional acts of the General Assembly of Virginia for the collection of taxes:

MARCH, 1645 6, 21. CHARLES 1ST. VOL. 1, pp. 329-30

## ACT XXI.

*Be it enacted by the Grand Assembly*, and the *authority of the same* That all levies that shall accrue from the publique shall be

satisfied by the last of November following. And, in case of non-payment, that the Sheriff be enabled to make seizure of the tobacco of the delinquents which in all probability will not be disposed of before that time, whereby the publique credit may be better preserved and the creditors fully satisfied in mind. Vol. I. pp. 219-20.

OCTOBER, 1646—21ST, CHARLES 1ST.

## ACT XXVIII.

This act after reciting the necessity for its passage, reads as follows:

*It is therefore enacted by the Grand Assembly*, That the Sheriff of the several counties respectfully do levy, if occasion be, by distress, and make such payments to such persons and for such debts as are here under mentioned," Vol. I, p. 337.

MAY, 1730, 3D AND 4TH, GEORGE 2ND.

## CHAPTER XV.

At this session the following act was passed, entitled "*An act for raising a public levy.*"

*Be it enacted by the Lieutenant Governor, Council and Burgess of the present General Assembly, and it is hereby enacted by the authority of the same.*

The 21st section of this act reads as follows: "And to the end that the publick county and parish levies, secretaries, clerks and other officers-fees may be discharged in due time. Be it further enacted by the authority aforesaid, That during the continuance of this act, all public county and parish levies, quit-rents, secretaries, clerks, surveyors and other officers-fees, payable in tobacco, shall be paid and satisfied by the persons, chargeable with and indebted for the same, to the sheriff or other collector, by inspectors notes before the tenth day of April, yearly. And if any person chargeable with the dues or fees aforesaid, shall neglect or refuse to pay the same within the time aforesaid, it shall and may be lawful to and for the sheriff or other collectors, immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof for tobacco, in the same manner as is directed by law for goods taken in execution." Vol. 4, pp. 255-6.

MAY, 1742—15TH, GEORGE 2ND.

Chapter I., Section 28, of an act passed at this session, provides as follows:

*And be it further enacted*, That all public, county and parish levies, quit-rents, secretary's, sheriff's, clerk's, surveyor's and other officers' fees payable in tobacco, shall be paid and satisfied by the persons chargeable with, and indebted for the same, to the sheriff or other collector, by inspectors' notes, before the tenth day of April, yearly. And if any persons chargeable with the levies, quit-rents, and fees aforesaid, shall neglect or refuse to pay the same, within the time aforesaid, it shall and may be lawful, to and for the sheriffs or other collectors immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof, for tobacco, in the same manner as is directed by law for goods taken in execution. And the overplus (if any be) after paying the said levies, quit-rents and fees, which is hereby declared to be the same as for serving any execution, shall be returned to the debtor." Vol. 5, pp. 124, 138-9.

OCTOBER, 1648—22ND, GEORGE 2ND.

An act was passed at this session prescribing the method of appointing Sheriffs, and for limiting the time of their continuance in office, and directing their duties therein. Sec. 9 of this Act provides as follows:

*And be it further enacted*, That where any person or persons holding lands of his majesty, shall fail to pay and satisfy the quit-rents due for the same, or where any person or persons shall be indebted for public county or parish levies, and shall not discharge the same within the time limited by law for the payment thereof, it shall be lawful for the Sheriff or collecter of such quit-rents or levies or either of them, to distrain any of the slaves, goods or chattels found upon the lands and in the possession of the person so indebted, or failing, notwithstanding such slaves, goods, or chattels shall be comprised in any deed of trust. And if the owner thereof shall not pay the quit-rents or levies due, within five days after such distress, such Sheriff or collector, shall and may lawfully sell, by public auction, the slaves, goods and chattels, distrained, or so much thereof as shall be sufficient to satisfy the said quit rents or levies, and the charges of distress and sale. But he shall give notice of the time and place of sale at the church of the parish wherein the distress shall be, by setting up a notice thereat, before the service

begins, at some convenient or usual place near such church, and by publishing the same in the churchyard, immediately after divine service on the next Sunday after the expiration of said five days, which said sale shall not be in less than three, nor more than six days, after notice so given, and shall be good and effectual in law, against all and every person and persons whatsoever, claiming or pretending to claim any right, title, or interest, in, or to any of the said slaves, goods or chattels," Vol. · p.

In 1775, the colony of Virginia, in concert with other colonies, revolted against the authority of Great Britain, and the first convention of her people hostile to the British government was held in Richmond in July, 1795. There was what was called an inter regnum in the government, until June 29, 1776, when a convention of the people of Virginia, declared, among other things, that the government of Virginia, as formerly exercised under the crown of Great Britian was "TOTALLY DISSOLVED." Vol. 9, p. 113.

OCTOBER, 1777—2ND OF THE COMMONWEALTH.

The first general law passed by the General Assembly of the Commonwealth of Virginia, after Congress adopted the Declaration of Independence, was chapter 11 of the Acts of this session. This act was as follows:

"*An act for raising a supply of money for publick exigencies.*"

*Be it enacted by the General Assembly* (Preamble omitted,) That a tax at the rate of ten shillings for every hundred pounds value, to be ascertained in the manner hereinafter mentioned, shall be paid for all manors, messuages, lands and tenements, slaves, mulatto servants to thirty-one years of age, horses, mules and plate, on the first day of August, 1778; and the like tax or rate shall be paid on the first day of August in each of the next succeeding seven years, by the owner or proprietor of such estates respectively, That the like rate of ten shillings for every hundred pounds shall be paid for all money exceeding five pounds in the possession of one person, by the possessor thereof on the said first day of August, in each of the said seven years. That a rate of two shillings for every pound be paid for the amount of the annual interest received upon all debts bearing interest, and also for the amount of all annuities, including the quit-rents payable to the proprietor of the Northern Neck, except such as have been or shall be settled by the general Congress, or the Assembly or convention of this Commonwealth, as a provision for wounded soldiers or their families, to be paid

by the creditor or annuitant, respectively, on the said first day of August in each of said seven years."

This is all of the first section of this act I deem necessary to quote here.

The third section of the act makes all the necessary provisions for the assessment of the taxes, as follows:

III. And for ascertaining the value of the several articles herein before taxed, according to such value, *It is further enacted*, That the freeholders and house-keepers of each county or corporation within this commonwealth shall meet at the court house of their respective county, city or town, on the second Tuesday in March, yearly, during the said term of six years, and they, or such of them as shall appear, shall then and there freely elect three able and discreet men of their county or corporation, being landholders having a right to vote for representatives in the General Assembly, and having visible property therein to the value of eight hundred pounds each, and who is not a member of any of the public boards, an officer in the navy or army, naval officer, a manager of any public works, an owner or manager of iron works, or manufactory of fire arms, a master or professor in any college or school, a clergyman, sheriff, inspector, or ordinary keeper, to be commissioners of the tax for such county or corporation for the year. The sheriff of the county, and the returning officer of any city or borough shall cause previous notice of such election to be posted in each church and meeting-house in his county or corporation at least twenty days before each annual election; and such sheriff or returning officer, together with the two senior justices who shall be present at the election, shall proceed to take the poll fairly and impartially, and shall be the final judges of the qualifications of the voters who offer to poll, as well as of the circumstances of the persons voted for, and shall have power to set aside such person as may be voted for as in their judgment hath not visible property to the amount of the sum hereby required, and on the close of the poll shall certify the names of the three persons who have the greater number of votes, and are so qualified, to the Court of their county or corporation, there to be recorded, determining the preference by their own votes, where the number of votes for any two or more persons are equal, and the persons so returned shall be the commissioners of the tax for that year.

Each commissioner, before he enters upon the execution of his trust, shall take the following oath (or, being a Quaker or Menon-

ist, shall solemnly affirm and declare to the same effect) before some Justice of the Peace, to-wit; "I, A. B., do swear that as a commissioner for the tax for——county, I will to the best of my skill and judgment, execute the duties diligently and faithfully, and do equal right and justice to all men in every case wherein I shall act as a commissioner, according to the act of Assembly under which I am appointed, to the best of my knowledge, without prejudice, favor or partiality, so help me God." And shall thereupon meet from time to time, at such place or places as to them shall seem most convenient, and appoint a clerk, at ten shillings per day, to attend them for entering their proceedings, and shall without delay proceed to lay off the county, city, or borough, into so many districts or hundreds as to them shall seem most convenient for making the assessments, bounding the same by water courses, roads or other limits of publick notoriety, and having so done, shall choose two discreet men in each hundred to be assessors or appraisors of such estate lying therein as is hereby subjected to taxation, each of whom shall be a landholder, having a right to vote for representatives in the General Assembly, which choice shall be certified under the hands of the commissioners, and delivered to the person first named in each hundred within twenty days thereafter, together with transcripts of such parts of this act as are necessary for the direction of the assessors, and such instructions as to the form of their proceedings and return as the commissioners may think proper to give them for complying with the true intention of this act, and the commissioners in such appointment shall also limit a time, not less than four weeks, or more than six weeks, for the assessors to perform their duty in, and to make return of their proceedings to the commissioners, and shall cause a description of the several hundreds to be entered on their books, with a list of the names of the persons appointed assessors in each, and a copy of the instructions given them as aforesaid. The several persons so named assessors in each district shall, within five days after receiving notice of their appointment and instructions as aforesaid, go together to one of the commissioners, or to a Justice of the Peace, and there take the following oath (or, being a Quaker or Menonist, shall affirm and declare to the same effect) to-wit: "I, A. B., do swear that I will well and truly execute the duty of an assessor, and faithfully, justly and impartially assess the pound rate imposed by the act of Assembly for that purpose, upon all property within my hundred liable thereto, accord-

ing to the best of my skill and judgement, and the directions of the saip act, and therein will spare none for favor or affection, nor any person aggrieve for hatred, malice or ill will, so help me God." A certificate of which oath shall be endorsed on the appointment of each set of assessors, and returned therewith to the commissioners to be entered on their books. And after being so sworn, the said assessors shall personally apply to every person within their district or hundred and require them, respectively, to give an account upon oath, which either of the assestors may administer, of all lands, slaves, mulatto servants to thirty-one years of age, horses, mules, money, silver plate, and interest received which shall become due after the passage of this act on debts bearing interest, all annuities (except a public provision for wounded soldiers and their families) all riding carriages, neat cattle, and tithable persons above the age of twenty-one years, not being soldiers, sailors or pari-h poor, or persons receiving allowances for wounds received in the public service, slaves or servants to thirty-one years of age, of which each such person is the owner, or who belong to or reside in his or her family, or which he or she is in possession of as guardian to any orphan, or as executor or administrator of the estate of any person deceased, and also an account of all spirituous liquors distilled or imported by land or water by any such person from and after the passing of this act for the first year, and afterwards annually from the time of rendering their last preceding account thereof, and every such person shall further make oath that he or she hath not shifted or changed the posession of any of the said taxable articles, or used any fraud, covin, or device, in order to evade the assessments thereof. The assessor shall also require all persons in their hundred having public salaries to render an account of the amount thereof, and all persons holding offices of profit (except military and sea-officers, in respect to their employment) and residing in their hundred, to render an account upon oath, to the best of their knowledge, of the neat annual income of such office; all and every species of which property so given in, or which the assessors shall by any other ways or means discover, they shall cause to be distinctly entered against the name of the owner or person chargeable with the tax thereon, and proceed to value the lands, slaves, horses, mules and plate so given in and discovered, as the same would in their judgment sell for in ready money, having regard to the local situation of the lands and other circumstances, taking for such value the middle

rate between them, in case the assessors differ in opinion on the value of any article, extending the value against each species of property, and setting down in a distinct column the amount of the pound rate hereby imposed upon the whole of such property belonging to each person, as well as the taxes of another nature imposed hereby upon such person, and giving such person a memorandum in writing of such pound rate, to enable him or her to provide for the payment thereof. And where a tract of land belonging to any person residing or having a plantation with slaves thereon, shall lie in two or more hundreds, the same shall be valued by the assessors of that hundred wherein the proprietor lives or hath a plantation. And if the owner doth not reside, or there be no plantation therein, then the lands shall be assessed in that hundred wherein the greatest quantity thereof shall lie. And in such case the assessor shall enter the county in which the proprietor lives if they are informed thereof; and when the assessor shall have thus valued all of the said taxable property in their hundred, they shall make a fair return of their proceedings to the commissioners, entering the names of the persons assessed in alphabetical order, with the species and value of their property and the pound rate thereon as aforesaid, and shall therein enter their own names with each distinct species of taxable property they severally own or possess as aforesaid, and upon such return the commissioners shall examine them severally upon oath, and thereupon extend the value of such property as to the commissioners shall seem just, and the pound rate thereon as aforesaid, and then shall cause all such returns to be entered in their books, to which all persons may have recourse at all reasonable times."

The *fourth, fifth, sixth and seventh* sections of this act, relate to matters not necessary to be inserted here, as they have no particular connection with the others, and therefore they are omitted.

Sec. VIII, provides as follows:

*And be it further enacted*, That the commissioners of the tax in each county or corporation shall, on or before the first day of August annually, deliver to the Sheriff of the county, or to the collector or collectors appointed as aforesaid, a full and perfect list, formed from the returns of the several assessors, of all the persons, in alphabetical order, who resides in the county, and are to pay any rate or tax pursuant to this act, with the amount of what each person is to pay, collecting together what the same person shall be assessed in different hundreds, and distinguishing in what hundred

the person chargeable resides or hath effects, taking a receipt from the Sheriff or collector for the same, and thereupon such Sheriff or collector shall proceed to collect and receive the several taxes and rates according to such list, and to levy the same by distress and sale of the slaves, goods and chattels, of such person who shall fail to pay what he or she shall be so assessed on or before the first day of September in any year, the sale of which estate shall be made not less than five days after the distress, for ready money, and notice thereof shall be published at the parish, church or most convenient meeting-house, and no security shall be taken, or writ of replevin sued out thereupon: but no Sheriff or collector shall seize any slave for such taxes where other sufficient distress shall be shown him, nor make any unreasonable distress, on pain of being liable to the action of the party grieved, wherein the plaintiff shall recover full cost, although the damages shall be under forty shillings."

The residue of this act relates to other matters not necessary to be considered.

NOVEMBER 1781.—6TH OF THE COMMONWEALTH.

At this session an act was passed entitled:

*An act for ascertaining certain taxes, and duties, and for establishing a permanent revenue.*

I. *Be it enacted by the General Assembly*, That the sheriff, and in case there be no sheriff, the first acting Magistrate of each county within this Commonwealth, shall annually appoint some day in the month of February, or at any time before the fifteenth day of the next succeeding month, if prevented from holding such courts in the month of February by any accidents, from and after the passing of this act, on which a court shall be held in his said county, and the said sheriff or magistrate, as the case may be, shall give notice thereof to the Justices and to the Clerk of his said county, who shall attend at the court house thereof on the day appointed, if fair, if not, on the next fair day, and the said Justices shall then and there appoint three reputable free-holders, resident in their said county, to be commissioners for ascertaining the value of all lands within the same, except the lands belonging to said commissioners, which shall be valued by two Justices to be appointed by the respective courts, who shall proceed in the same manner, and be allowed the same pay and be liable to the same penalties, as directed in the case of commissioners by this act, which said commissioners, before they enter upon the duties

of their office, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear (or affirm as the case may be) that I will truly, candidly, and impartially ascertain and fix the value of the several kinds of lands within my county, as the same shall be worth in specie if sold for ready money, separately from other lands, after reasonable public notice, according to the best of my judgment: so help me God," which oath or affirmation shall be administered by any Magistrate within the county, and the two commissioners first named in the appointment of the court shall proceed to take an account in writing of the quantity of land belonging to all persons within their said county, except as before excepted, and also the names of the proprietor or proprietors thereof, and shall ascertain the value of the said lands by the acre, computing the same by the average of the value of the quantity contained in each tract or parcel of land separately lots in any town excepted, which shall be valued separately from other lands, and with due regard to their situation; and where any lands or lots as aforesaid shall be valued pursuant to this act, the same shall be done without having regard to any buildings or other improvements thereon. And in all valuations of land pursuant to this act, the same rules and regulations shall be observed with respect to and between landlords and tenants (unless the contract between them shall be specifically otherwise) and the same discount for quit-rents on the lands in the Northern Neck, as are directed by the act of one thousand seven hundred and seventy-seven, entitled, "An act for raising a supply of money for public exigencies." And in case of the death or inability of either of the two commissioners first named the third commissioner shall then proceed to act in his stead; and in case of the death or inability of any two or all of said commissioners, the first Magistrate acting in said county shall, by warrant under his hand and seal, appoint other reputable free-holders in his said county to act in their stead; which warrant shall be directed to and executed by the sheriff of the said county, who shall return the same to the next succeeding court, there to be recorded as the act of said court. And the persons so appointed shall take the oath as abeve mentioned, and shall perform the duties required of commissioners by this act, either in whole or in part, as the case may require. And where any two commissioners acting pursuant to this act shall differ in opinion as to the value of any land or lots, as aforesaid, the two sums shall be added together and one-half thereof shall be taken as the value of said lands or lots. And if

any proprietor or proprietors of lands or lots as aforesaid, his, her, or their tenant, attorney or overseer residing upon the land or lots aforesaid, or in case of any infant or infants, his, her, or their guardians, shall refuse to give an account of the quantity of lands or lots held by any of them or under their respective management, within the time for the commissioners to make return of their proceedings according to this act, such person or persons so refusing or neglecting as aforesaid, shall forfeit and pay the sum of one hundred pounds, recoverable by information in any county court within the commonwealth, to be applied towards lessening the county levy where the same shall be recovered; and the said land or lots shall be liable to double taxes upon the quantity when duly ascertained, or in the estimation of said commissioners, in the list returned by them. And the said commissioners shall make out a fair list of the names of the proprietors of lands or lots, the quantity of lands and lots belonging to each proprietor, and the value thereof, in separate columns, and return the same to the clerk of the court of their county, on or before the first day of June annually, and the said clerk shall file the same in his office, and shall make out these from three fair copies, one of which shall be delivered to the auditors of public accounts, at their office, by the said clerk, on or before the first in each year, one other copy to be set up in the court house of the county on the next succeeding court day, and the other to be delivered to the sheriff or collector of public taxes in said county, on before the tenth day of June annually. And each commissioner shall be allowed the sum of fifteen shillings per day for the time he shall be actually employed in performing the duties required of him by this act, the account of which shall be allowed on oath by the court of the county, and certified by the clerk thereof to the sheriffs or collectors of the public taxes for payment out of the public money in his hands." The balance of the section relates to other matters than the taxes to be collected and paid.

But this matter is provided for by section two of the act, page 504, as follows:

"*And be it further enacted*, That there shall be collected, paid and distrained for the tax of one pound for every hundred pounds. And so in proportion for a greater or lesser sum, of the valuation of all lands and lots, as the same shall be returned by the commissioners to the clerk of each county within this commonwealth;

also a tax of ten shillings for every free male person above the age of twenty-one years, who shall become a citizen of this commonwealth, and also upon all slaves, to be paid by the owners thereof, except such free persons and slaves as shall be exempted on applications to the respective county courts through age or infirmity; also two shillings for every horse, mare, colt and mule; also three pence per head for all net cattle; also five shillings per wheel for all coaches, chariots, phaetons, four wheeled chaises, stage wagons for riding carriages, chairs and two wheeled chaises; also fifty pounds for every billiard table and five pounds for every ordinary license, which tax shall be paid annually in the manner hereinafter provided."

And section *four* of said act, pages 506-7, after providing for the bond and security to be given by the sheriff for the collecting and accounting the said taxes, reads as follows:

"And the said sheriff shall, from and after the tenth day of June annually, collect and receive from all and every person and persons chargeable therewith, the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of July annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels which shall be found upon the lands, and in the possession of the person so indebted, or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes and charges of distress and sale, giving six days notice of the day and place of sale, by advertising the same at the church or other public places in the parish wherein such distress shall be, on the next Sunday after the expiration of the said five days, which shall be good and effectual in law, against all persons whatsoever; *Provided*, That in all cases where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall give at least four weeks notice in the public papers before any sale shall be made of the same; and where other sufficient effects can be had thereon, distress shall not be made of such lands; *Provided always*, That where unreasonable seizures or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages shall be given; and the said sheriff or collector shall duly

account for and pay into the treasury of this commonwealth, on or before the first day of September annually, the full amount of all taxes imposed in his said county, deducting therefrom an allowance for insolvents, and such other allowances as this act directs to be made, and five per centum for his commissions thereon; and before any allowance shall be made in the case of insolvents, the sheriff shall return a list thereof to the court of his said county, and shall make oath that the same is a true list of insolvents within his county, and an attested copy of which shall be delivered to the auditors of public accounts by the sheriff, and the same shall be by them allowed in passing the accounts of such sheriff."

The balance of this section, as well as of the act, except the seventeenth section applies to other matters than the sale of lands for taxes

The said seventeenth section, page 516, provides as follows:

"*And be it further enacted*, That where any distress shall be made pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*."

VOL. X. pp. 501 to 516.

OCTOBER 1782—7TH OF THE COMMONWEALTH.

VOL. XI. P 112.

At this session an act was passed entitled as follows:

*An act to amend and reduce the several acts of assembly for ascertaing certain taxes and duties, and for establishing a permanent revenue into one act.*"

The *second* section of this act provides for the levy and collection of additional taxes, as follows:

"*Be it enacted*, That from every owner of land or lots within this commonwealth, in addition to the tax already imposed, there shall be collected and distrained for, fifty per centum on the amount, or ten shillings on the pound of all sums payable for tax on land and lots, as the same may be charged by the examiners appointed under the act of the present session of assembly, for equalizing the land tax." The balance of the section provides for the levy of additional taxes on persons and personal property. Section *three* of this act substitutes Justices of the Peace for the commissioners theretofore appointed to take lists of the taxable persons

and property, and for the disposition of said lists when taken. And section IV among other things provides for the collection of the taxes assessed, as follows: "And the said sheriff shall, from and after the first day of May annually, collect and receive from all and every person and persons chargeable therewith the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of June annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same or so much thereof as shall be sufficient to discharge the said taxes and the charges of distress and sale, for ready money; but if the same will not sell, in the opinion of the officer making the distress, for three fourths of their value, then the same shall be sold for one month's credit, giving six days notice of the day and place of sale, by advertising the same at the church, or other public places in the Parish wherein such distress shall be, on the next Sunday after the expiration of said five days, and shall take sufficient security residing in the county, for the payment thereof; and in case the same shall not be paid within the said one month, such officer is hereby authorized and required to make immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their securities, and proceed to sell the same for the best price that can be got in ready money; which several sales shall be good and effectual in law against all persons whatsoever. *Provided, always*, that where any sheriff or collector shall make seizure of any lands by virture of this act, he shall sell the smallest number of acres that the lowest bidder will pay the taxes for, together with the charges of distress and sales which shall be laid off by the Surveyor of the county, and conveyed by the sheriff. The proprietor of the land, his or her agent or attorney, may appoint, on the day of sale, what of the tract shall be sold; and in case of failure so to do the sheriff or collector shall sell that part as in his opinion will least injure or prejudice the tract; and where other sufficient effects can be had thereon, distress shall not be made of such lands. *Provided, always*, that where unreasonable seizures or distresses shall be made, the party grieved shall have an action against the sheriff or collec-

tor, and shall recover full costs where any damages shall be given."

The balance of this act relates to other matters, and is therefore omitted.

1788—JANUARY 7TH, APPENDIX 4 TO REVISED CODE OF 1819, VOL. 2ND, P. 515.

At this session an act was passed, entitled, *An act to remedy abuses in the manner of selling lands for the payment of public taxes.*

1. "Whereas, the manner of selling land, as heretofore practiced by the various sheriffs and collectors, for the payment of the public taxes due thereon, has, in many instances, produced great oppression; for remedy whereof in future, *Be it enacted*, That all sales of land for the payment of taxes shall be on the premises; and any sale made thereof otherwise shall be void.

2. No sale shall be made of land for payment of taxes, if other property sufficient, belonging to the person chargeable with the land tax, can be found in the county.

3. Before any sale shall take place of any land for payment of taxes, notice thereof shall be given at least eight weeks in the Gazette of the public printer, and shall be advertised at the Court House of the county where the land lies, on the first day of two several courts previous to such sale; and proclamation shall also be made thereof at the door of the Court House, on the said days, between the hours of twelve and four.

4. All sales of land so made, shall be conducted by the high sheriff, where the sheriff has entered into bond for the collection of the taxes. And, if any other person hath been or shall be appointed by the court to collect the taxes, the sales of land made to discharge the taxes shall be conducted by the said collector, and not by a deputy.

5. The said high sheriff or collector of taxes shall give to the commissioner of the land tax in his county at least thirty days notice, previous to any sale of land as aforesaid; and the said commissioner shall attend the said sale, for which he shall be allowed six shillings, to be paid by the person chargable with such land tax; and if the land so offered for sale will not yield a price in the opinion of the said commissioner, equal to one half of the value thereof, taking for his guide, in estimating the value, the price at which such land is charged, by the act equalizing the land tax, and

having regard to the quality of the particular part of the land so offered for sale, then the said commissioner shall bid for and purchase the said land on account of the public, and shall give to the sheriff or collector a certificate thereof, expressing therein the amount of taxes for which such land hath been sold; which certificate, being by the said sheriff or collector paid to the treasurer, he shall have credit for the same, in part of the land tax; and the person who was chargeable originally with the said land tax, may discharge the same, and be entitled to all the estate he held to such land, in as full and ample a manner as if the said sale had never been make; provided, payment be made of the said taxes agreeably to the certificate of the commissioner, into the public treasury, at any time within six months after such certificate shall be delivered to the treasurer, together with twenty five per centum damages on the amount thereof; or if payment be made at any time, not less than six months, nor more than two years thereafter, the same may be discharged by payment of double the amount of said certificate. But, provided payment shall not be made thereof within two years from the time that such certificate shall be paid to the treasurer, then, and in that case, the Governor shall appoint such person or persons, as may to him, with the advice of council, seem proper, to sell the said land and convey the same to the purchaser thereof, and pay the amount of the debt due to the public, with the damages and expenses of sale in the first instance from the money arising from the sale thereof, and to pay the surplus, if any, to the person who may have been the proprietor of the land, at the time the commissioner of the taxes may become the purchaser thereof, on public account, or to the legal representative or representatives of such proprietor."

The remaining sections relate to other matters and are omitted.

The act last above mentioned was followed by another passed December 27, 1790, entitled: *An act to amend the act, entitled, An act to remedy abuses in the manner of selling lands for the payment of public taxes as follows:*

1. *Be it Enacted by the General Assembly*, That so much of all and every act and acts as directs the sale of any lands for the payment of the tax thereon, shall be and the same is hereby repealed.

2. *And be it further enacted*, That each sheriff or collector of taxes within this commonwealth, shall at the time he returns a list of other insolvents, return a list of the lands within his county or

corporation, where he can not find effects within the same belonging to the owner or tenant thereof, sufficient to satisfy and pay the tax. And if the court shall be satisfied of the truth thereof, they shall admit the sheriff or collector to make oath thereto, and direct the same to be certified to the auditor of public accounts, together with the names of the owners of each tract of land, and the place of his or her abode, where the court can obtain such information.

3. The auditor shall credit the same in account for the land tax with such sheriff or collector. And where it shall appear to the auditor from the certificates of the county courts, or where he shall be satisfied from other information, that any person so chargeable with any of the said taxes, resides, or hath any slaves or personal property in some other county of this Commonwealth, than that in which such land may lie, he shall certify the amount of the land tax with which such person is or shall be chargeable to the sheriff or collector of the county in which such person may reside, or have slaves or personal property, as the case may be, and shall debit such sheriff or collector with the amount of the taxes so transmitted to him, who may make distress for the same, and shall be accountable therefor, in like manner as for other taxes of his county.

4. A list of these insolvents, with the amount of the tax due from them respectively, shall be furnished by the clerk of the court to the collector of the tax for the succeeding year, and he shall also transmit a copy thereof to the auditor of public accounts, who shall debit the sheriff or collector therewith; and such sheriff or collector shall distrain and account for the same in like manner as for other taxes. And in case the said taxes cannot be collected the suceeding year, the like return upon oath shall be made, as is hereinbefore prescribed; and thereupon the treasurer shall cause to be inserted in the Virginia Gazette, for three weeks succesively, the names of such delinquents, with the quantity of land, the situation thereof, and the taxes due thereon.

5. *And be it further enacted*, That in case the tax on any tract of land within this commonwealth shall not be paid for the space of three years, the right to such land shall be lost, forfeited, and vested in the commonwealth; and it shall be lawful for any person to acquire title to any land so forfeited, in the manner prescribed for acquiring titles to waste and unappropriated lands within this commonwealth, on the eastern waters, by an act, entitled, "An act

to dispose of waste and unappropriated lands in the commonwealth of Virginia, on the eastern waters."

The residue of the act has no bearing upon the questions involved in this case.

The almost continual legislation of Virginia to enforce the payment of taxes on lands by the owners thereof, when they were returned delinquent for a failure to pay, it would seem suggested to the owners of lands the idea of leaving their land off the land books and thereby preventing them from being charged with taxes. And to circumvent this scheme of the land owners, the General Assembly on FEBRUARY 5, 1810 (2d Rev. Code of 1819, p. 533), passed the following act:

*An act to compel persons, who own lands in this Commonwealth, to cause the same to be entered in the books of the Commissioners of the Revenue and for other purposes.*

1. Whereas, It is represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue thereupon; for remedy whereof, *be it enacted*, That if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioner's books of that county in which the land lies within eighteen months after the passage of this act, the same shallbe forfeited to this Commonwealth: *Provided always*, That the rights of infants, femes covert and persons of insane memory shall not be affected by this law.

2. *And be it further enacted*. That the land so forfeited shall be sold, and the money to arise from such sale shall be paid into the public treasury there to remain at the disposition of the General Assembly.

3. *And be it further enacted*, That the high sheriff, the clerk of the supreme court of law, and the attorney for the commonwealth in each county, or any two of them, shall be, and are hereby authorized as commissioners, to make sale of the lands so forfeited and execute deeds therefor.

4. *And be it further enacted*, That every person who shall make discovery and proof to the county court of lands forfeited by virtue of this act shall receive therefor ten per centum upon the amount of the sale of any such lands. And it shall be the duty of the said court, immediately upon such discovery and proof, in a summary way to make an order in the nature of a decree directing the afore-

said commissioners to sell said land to the highest bidder for ready money. *Provided, nevertheless*, that no sale shall be made by virtue of the act, unless the same shall have been advertised two months previous thereto at the door of the court house of that county wherein said lands shall lie. *And provided also*, that the said forfeited lands shall be sold at public auction, on some court day, not more than four nor less than two months after the rendition of the decree aforesaid. *Provided also*, that no person shall receive said per centum for discovery and proof of forfeited lands, nor shall any proceedings be had relative to such proceedings by the Court, until the first day of June, in the year one thousand eight hundred and twelve.

Sections *five to twelve* omitted as not bearing upon the question under consideration.

13. *Be it further enacted*, That the deeds to be made in virtue the *eighth* section of the aforesaid act shall be made by the commissioners appointed by the act, or by any two of them, and not by the sheriff only.

FEBRUARY 9, 1814. 2nd. Rev. Code 1819, p. 542.

At this session of the General Assembly a very carefully prepared and comprehensive act was passed, covering *thirteen* pages of that Code, comprising the whole law for the assessment and collection of taxes in the commonwealth, and repealing all other acts and parts of acts coming within the purview of that act, in force prior to the passage thereof.

It is impossible for me, for want of time, to insert here the whole of this act, nor do I deem it necessary to do so, as a large part of the act relates to other matters than the levy and collection of taxes. And I am forced to content myself with the insertion of those sections and parts of sections only bearing upon the main question heretofore stated, to-wit: *What is due process of law in proceedings by a State for the collection of her taxes?*

It already appears that from the passage of the first act at the session of 1606, for the collection of taxes that the remedy for their collection provided by the several statutes passed for the purpose, was the summary remedy by distress and sale, alone, of the property of the delinquent, whether the property distrained was land or personalty, and that judicial process was never resorted to for that purpose. And now, that all the laws formerly passed for the collection of taxes were repealed by the act last above referred to,

it becomes necessary to see if any change in the manner of collecting taxes, than by distress and sale of the real and personal estate of the delinquent or by sale of forfeited lands without distress, has been adopted in the old or the new state.

Sec. 1 of said last mentioned act provides as follows:

*Be it enacted by the General Assembly:*

That the commissioners of the revenue shall annually make out their books containing a list of the land tax within their respective districts; and that the said books shall be in the form following:

List of the land tax within the district of A. B. commissioner in the county of C. for the year.

| Name of owner. | Residence. | Estate. | Nunber of town lots. | Name of the town. | Yearly rent of lots. |
|---|---|---|---|---|---|
| Amount of taxes upon lots at —— in —— | Number of acres of land. | Description of the land. | Distance and bearing from the ct. house. | Rate of land per acre. | Total value of land. |
| Amount of tax upon land at —— per —— | Total of tax on lots and land. | Explanation of alterations during the preceding year. | | | |

The said commissioners shall enter each tract of land and town lot separately in their said books; and, according to the best information which they can obtain, shall particularly describe the same in the manner following: in the first column they shall enter the name of the person, who, by himself, or his tenant, has the freehold in possession; in the second, the place of his residence; in the third, his estate, that is, whether for life, or in fee; in the fourth, the number of lots in any town; in the fifth, the name of the town in which they are situated; in the sixth, the yearly rent of the lots; in the seventh, the amount of tax upon the lots at the rate of taxation ascertained by law; in the eighth, the number of acres of land; in the ninth, the description of the land as to the water courses, mountains, or other notorious places, on which or near to which it lies, other lands which it adjoins, and the number of the tract, if any; in the tenth, its distance and general bearing from the court house of the county; in the eleventh, the rate of the land per acre; in the twelfth, the total value of the land; in the thirteenth the amount of the tax on the whole tract at the rate of taxation prescribed by law; in the fourteenth, the total amount of taxes

on lots and lands; in the fifteenth, all alterations made since the preceding year shall be particularly noted and explained, showing distinctly for what reason and upon what authority each alteration has been made.

2. The said commissioners annually, when they take their lists of taxable personal property, shall carry with them their land-books of the preceding year, and show to each person resident within their respective districts, and to the agent, if any, of each non-resident, the quantity and description of lots and tracts of land charged to him, and shall require of such resident person and such agent of each non-resident person, to state upon oath or affirmation, whether the lands and lots so charged, be correctly entered and described; whether any part thereof ought to be transferred to any other person; and if so, to whom, and for what cause; and whether any other tract of land or lot within their respective districts ought to be charged to such resident or non-resident. And they shall further require of such resident and such agent, on oath or affirmation, such description of the lands and lots so charged, and of such other lands or lots as ought to be charged, as will enable the said commissioner to comply with the requisitions of this act.

3. If any person being so called on by any commissioner, shall fail or refuse without sufficient cause therefor, to give such statement on oath or affirmation, such person shall forfeit and pay to the Commonwealth for the use of the literary fund the sum of fifty dollars, to be recovered by action of debt, information and an indictment in the inferior or superior court of law for the county in which the offence was committed. And, in order that such offence may be prosecuted, it shall be the duty of the commissioner forthwith to give information thereof to the attorney for the commonwealth and to the court of the county.

4. Every commissioner shall annually in making out his new land book, correct such errors in the entries or descriptions of the preceding year as shall be made to him by satisfactory evidence. But no transfer of lands or lots heretofore correctly charged, shall be made from one person to another, and no entry of lands or lots, not charged before, shall be hereafter made, but upon evidence of record that such transfer or entry is proper.

5. The lands of any person after his decease shall be charged to his estate until it shall appear of record in the court of the county, where the land lies, to whom such land ought to be transferred, and, in the meantime, the personal property belonging to the estate

of such deceased person, shall be liable to distress for the payment of the taxes due on such land.

6. Whenever any commissioner shall hereafter enter, or shall heretofore have entered to one person, any tract of land or lot, which had before been entered to another person, such person shall be forthwith discharged of such tract of land or lot, or part of a tract of land or lot, and the commissioner shall correct his books accordingly. For every transfer so made, by entry to one person and discharge of another, the commissioner, in lieu of the compensation heretofore allowed by law, shall be entitled to a fee of seventy-five cents, to be charged to the person to whom the transfer is made.

7. When any land shall hereafter be entered in the commissioner's book, which had not before been entered, or which, for any cause, had been omitted for one or more years preceding such entry, it shall be the duty of the commissioner to value and assess such land according to law; provided it has not been previously so valued and assessed, and to charge the taxes thereon for so many years, and at such rate for each year, as the person in whose name it shall be entered, would have been justly chargeable with, if such land had never been omitted, or had been duly entered at the time when the title accrued to such person, his ancestor or devisor. And as a penalty for the failure of the owner to enter such land on the commissioner's books, the commissioner shall charge thereon damages at the rate of twenty-five per centum per annum on the amount of each year's taxes which shall have fallen due from the first day of January, one thousand eight hundred and eleven, up to the time when the entry shall be made.

The *eigth*, *ninth*, *tenth* and *eleventh* sections provide for the making up and correction of the land books. Sections *twelve* and *thirteen* are as follows:

12. When the commissioner shall have completed his book in each year, he shall, on or before the first day of June, deliver one fair copy thereof to the clerk of the county, to be by him preserved amongst his records for the inspection of every person in any manner interested therein; and shall, on or before the first day of September, deliver another fair copy thereof to the auditor of public accounts, as his guide in correcting the equalizers' book, and in settling with the sheriff; and on or before the thirty first day of May, deliver another fair copy thereof to the sheriff of the county, which shall be his guide in collecting the land tax of the current year.

13. The commissioner shall, in no case, make any alteration in

his land book, after it shall have been certified to the clerk. But if any person shall think himself aggrieved by any entry made in said book, he shall be at liberty at any time within twelve months after the 1st day of June succeeding such entry, to apply to the court of the county for relief; and if the court upon examination of legal evidence, shall be satisfied that the applicant is erroneously charged with any taxes on said book, they shall make an order that he shall be exonerated from the payment of so much as is erroneously charged, if he have not already paid it; and if he have, that it be refunded to him. Such order, delivered to the sheriff, shall restrain him from collecting the taxes so erroneously charged, or, if they have already been collected, shall compel him to refund the money, if he have not paid it into the treasury, and shall be a sufficient voucher to entitle him to a credit for so much, in his settlement with the auditor. If the taxes so erroneously charged have been collected and paid into the treasury, the order of the court aforesaid shall entitle the claimant to a warrant on the treasury for the amount thereof: *Provided, always*, That the attorney for the commonwealth, or in his absence, some attorney appointed by the court for that purpose, shall appear on behalf of the Commnwealth, and defend such application; and that no order made as aforesaid shall have any validity, unless it appear, on the face thereof, that such attorney did appear on behalf of the Commonwealth. If such application should fail, judgment shall be entered against the applicant, and he shall pay costs, including an attorney's fee; which if the sum in controversy be under twenty dollars, shall not exceed one dollar and twenty-five cents.

Sections *fourteen* and *fifteen* have no bearing upon the question in contest, and are omitted.

Section 16 reads as follows:

16. *Be it further enacted*,

That in the collection of taxes due upon lands the sheriff shall be authorized to distrain any personal property in his bailiwick, belonging to the person to whom such taxes are charged, or any personal property on the land, in possession of such person, his tenant or any other claiming title by, through, or under him; *Provided*, That the property of any person in possession of any part of a tract of land or lot, the whole of which stands charged to another, having a a freehold title of record to that part, derived by, through or under that other, shall not be liable to distress for any taxes on the

residue of the land, having accrued subsequent to the date of such record: *And provided, also*, That the sale of any personal property distrained upon the land for taxes due thereon, shall convey only such title as the owner or occupier of such land held in such personal property.

17. In any case where a tract of land, charged with taxes in one county, lies partly in that county and partly in another, it shall be lawful for the sheriff of the county in which the land is so charged to distrain on that part of the land lying in the other county, in the same manner as if such part was actually in his own county.

18. The sheriff, whenever he shall return any land delinquent, for the non-payment of the taxes due thereon, shall distinctly set forth, that he could find no property within his bailiwick belonging to the person charged with such taxes; and that, after diligent enquiry, he could either not find any property on the land liable to distress, or could not ascertain the land so charged.

19. The form of his return shall be as follows:

List of delinquenciess in the land tax, in the county of , for the year.

| Name of Person. | Residence. | Estate held. | Quantity of land. |
|---|---|---|---|
| Description and local situatoin of land. | Distance and bearing from court house. | Amount of tax. | Why returned delinquent. |

20. At the foot of such return, he shall take and subscribe the following oath or affirmation, such oath or affirmation to be taken before any justice of the peace, and certified by him:

I, A. B. sheriff, (or deputy sheriff, as the case may be,) do solemnly swear (or affirm,) that the foregoing list of delinquencies in the land tax in the county of , for the year is, as I do verily believe, correct and just; that I have received no part of the taxes therein returned delinquent; and that I have made diligent enquiry, for the purpose of finding property within my bailiwick, liable to distress for the said taxes, but have found none.

A. B., sheriff of county,
(or D. S. for , sheriff of county.)

21. The court of the county shall not allow, or certify in favor of any sheriff, any list of delinquencies in the land tax, which shall not be made out, sworn to and subscribed, in the form aforesaid;

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nor shall the auditor give any sheriff a credit for any such list of delinquencies, which shall not be so made out, sworn to and subscribed, and which shall not, moreover, be allowed and certified by the court.

22. The sheriff shall make out three fair duplicates of such list, one of which he shall deliver to the clerk of the county court, at the time when the same shall be allowed and certified by the court; another he shall return to the auditor, when he settles with him for the taxes of that year; and the third he shall preserve himself during his continuance in office, and forthwith thereafter deliver the same over to his successor." The balance of the section is omitted for the same reasons above stated.

23. *And be it further enacted*, That in the year eighteen hundred and fifteen, and in every year thereafter, the sheriff of each county shall be charged with the collection of the delinquent land taxes of the preceding year. In performing this duty he shall be governed by the list of delinquencies, made out and retained as above provided for, either by himself or his predecessor, as the case may be; or if, from any cause, such list should not be in possession of such sheriff, and cannot be obtained from his predecessor, he shall then be governed by a copy from the duplicate thereof, which he shall obtain from the clerk of the county court or from the auditor.

24. The sheriff shall add to the principal sum of arrearages on each tract, ten per centum, as damages for the want of punctuality in the payment; and for the collection of these arrearages and damages, he shall have the same power of distraining and selling personal property, as for the collection of other taxes on land. He shall, morever, at the May, June and July term of the county court of his county, advertise a sale of the delinquent lands, at the door of the court house, in the following form:

Notice is hereby given that at the next August court of——— county, at the court house thereof, I shall sell at public auction, for cash, so much of all the lands and lots in that county, returned delinquent for the non-payment of the taxes of the last year, as will be suffcient to discharge the arrears of taxes which shall then remain unpaid, for that year, and ten per centum damages thereon, together with the taxes of the present year. The sales will commence on the first day of the court, and continue from day to day, until they shall be completed.

The subscriber is authorized to receive all such taxes and damages at any time before the land shall be sold. A list of delinquencies may be seen in the clerk's office of the county, in possession of the subscriber, or in the office of the auditor of public accounts.

A. B., sheriff of county,
or, A. B., deputy for sheriff of county,
day of

25. A copy of this advertisement shall also be published, at least

once in every week for two months preceding the time of sale, in some newspaper printed in the city of Richmond.

26. The sheriff shall annex, to his advertisement at the door of the court house, a copy of his list of delinquencies; and, for his trouble and expenses in setting up and publishing the advertisement aforesaid, he shall be allowed the sum of three dollars, to be paid out of the public treasury; and shall also be allowed the expense of publishing such advertisement.

27 In pursuance of said advertisement, the sheriff shall accordingly sell so much only of each tract of land and lot within his county, returned delinquent for the preceding year, as will be sufficient to discharge the arrears of taxes for the year which then remains unpaid, with ten per centum damages thereon, and the taxes due for the year in which the sale shall take place.

28. The sheriff, on behalf of the Commonwealth, shall execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth, particularly and truly, the amount of the purchase money; but the deed shall contain no warranty, nor shall the Commonwealth be in any manner answerable for the title, or liable to refund the purchase money for any defect of title, or irregularity, or error of any kind in the proceedings. For executing the deed, the sheriff shall be allowed one dollar, to be paid by the purchaser.

29. If less than the whole tract of land, or the whole lot, be sold, the purchaser shall be tenant in common with the person holding the residue. Neither the sheriff nor any of his deputies, shall directly, or indirectly, become the purchaser of any land or lot so sold by him for arrears of taxes; and, if any sheriff, or deputy sheriff, shall, contrary to this provision, become the purchaser of any such land or lot, he shall forfeit and pay to the Commonwealth, for the benefit of the literary fund, the sum of five hundred dollars, and shall moreover hold such land or lot in trust, for the absolute use and benefit of the person who owned the same at the time of the sale, his heirs and assigns.

30. If no person shall agree to give, for any tract of land or lot so exposed to sale, the amount of taxes and damages for which it is hereby directed to be sold, the title to such tract of land or lot, shall be thereupon vested in the president and directors of the literary fund in the same manner as if they had been purchasers thereof at the sale, and as if the sheriff had executed to them a deed therefor; and the taxes due thereon shall be extinguished.

Such lands or lots, while they remain the property of the literary fund shall not be chargeable with tax.

31. When the sheriff shall have completed his sales he shall make out a fair and distinct statement of his proceedings, setting forth plainly on what tracts of land or lots the taxes have been paid without a sale, what tracts or lots of land have been sold entirely; what quantity or proportion of other tracts or lots have been sold; what the name and residence of the purchaser, and what tracts have been vested in the literary fund. This statement, verified by the oath or solemn affirmation of the sheriff, made in writing at the foot thereof and subscribed by him, shall be returned to the court of the county, to be by them examined, allowed and certified, in the same manner that they examine allow, and cerufy the sheriff's list of delinquent land taxes, and a duplicate of this statement, so authenticated, shall be delivered by the sheriff to the clerk of the court, to be by him recorded.

32. The auditor shall annually charge the sheriff with the delinquencies of the land tax of the preceding year, together with ten per centum thereon; and the sheriff shall account therefor in the same manner as for other taxes, with which he is chargeable, be subject to the same penalties and recovery in case of failure, and be entitled to the same commissions. In settling with the sheriff therefor, the auditor shall be guided by the statement so as aforesaid and allowed and certified by the county court.

Section 33 imposes heavy penalties on the sheriff for corruptly swearing falsely, and for other violations of his duty as to such sales.

34. If, from any cause, the sales of delinquent lands in any county shall not take place at the August court in that year, as herein directed, such delinquencies shall be carried into the account of the next year, adding always ten per centum per annum thereon; and they shall be charged to the sheriff, collected and accounted for by him in the same manner with other delinquencies in the land tax.

35. If the sheriff shall fail to make out a correct statement of his proceedings in the manner and form above required, or shall fail to deliver a duplicate thereof to the clerk of the court at or the first court after the sales shall have been made, he shall, for each offence, forfeit and pay to the commonwealth, for the benefit of the literary fund, the sum of fifty dollars, to be recovered by mo tion, on ten days' previous notice, before the Superior or Inferior court of the county.

36. Any tract of land or lot, or part of a tract of land or lot, so as aforesaid sold for the non payment of taxes, may be redeemed by the former owner, his heirs or assigns, at any time within one year from the date of the sale, by the payment of the original purchase money, including the costs and charges of executing and recording the deed, together with fifty per centum per annum interest thereon, and the taxes which may have been charged to the purchaser, after the sale. Any land or lot vested in the president and directors of the literary fund as aforesaid, may be redeemed within the same time, by the payment of the taxes and damages for which such land or lot was sold, together with fifty per centum per annum interest thereon. If the owner of any such land or lot, at the time of the sale thereof, or at the time of the vesting thereof in the literary fund, shall be an infant, feme covert, insane, imprisoned, or out of the Commonwealth, being engaged in the service of this State or of the United States, such person shall be at liberty to redeem such land or lot, upon the terms aforesaid, at any time until the expiration of three years after the disability shall be removed.

37. The sales made as aforesaid, and the titles vested in the literary fund as aforesaid, shall give to the purchaser, or to the literary fund, as the case may be, only such estate and such right, as, at the time when such land or lot was returned delinquent, was vested in the person in whose name it was returned, his heir, devisee, or other person claiming by, through or under him; save only, that all use, trust and equity of redemption, shall be extinguished by such sale or vesting in the literary fund.

38. After the time for redemption, hereby allowed, shall have elapsed, the regularity of the proceedings under which the purchaser at the sale, or the literary fund, claims title, shall not be questioned, nor shall the arrearages of the taxes, for the non-payment of which such sale was made, or such title was vested, be denied, so as to affect such sale or title, unless such irregularity, or the fact that such arrearage did not exist, appear on the face of the proceedings, or unless such irregularity or such fact, be made appear by proceedings in court, duly commenced before the expiration of such time for redemption, and duly prosecuted to a judgment or decree.

42. If at any time before the sale of any tract of land or lot, heretofore, returned delinquent for the non-payment of the taxes, any person claiming title thereto, or a part thereof, shall show, by sufficient evidence to the court of the county in which such land or

lot may lie, the taxes said to be in arrear and due thereon, or any part thereof, are really not so arrear and due, either having been erroneously charged on the books of the commissioner, or having been actually paid, it shall be lawful for such court, under the limitations, injunctions and conditions contained in the preceding provision, to render judgment, exhonerating such land or lot, or the part thereof so claimed, from the taxes so erroneously charged thereupon, or so having been actually paid, or not so due and in arrear. If any application for such judgment shall fail, judgment shall be rendered against the applicant, and he shall pay costs, including an attorney's fee, not to exceed one dollar and twenty-five cents, where the sum in controversy is less than twenty dollars.

Sec. 43, provides for reimbusement by the State of taxes improperly charged and paid in certain cases.

44. *And be it further enacted*, That on or before the first day of March in the year eighteen hundred and fifteen, the auditor shall transmit to the clerks of the respective county courts all such lists of delinquencies in the land tax, which have been heretofore returned, as have not already been transmitted under the act entitled, *An act concerning taxes on lands*. And together with such lists he shall furnish certificates of all payments thereon which shall have been made into the treasury.

45. The said clerks shall thereupon, on or before the first day of May following, deliver to the sheriffs of their respective counties, distinct lists of all arrearages, due upon lands and lots, crediting thereon as well the payments certified by the auditor, as all payments heretofore made at their offices under the before recited act concerning taxes on land. The Sheriff shall collect and account for these arrearages, and the damages thereupon, shall proceed therein by distress, by sale of the land, and, in every respect whatever, shall perform the same duties, and be liable to the same penalties and recovery in relation to them, as if they were part of the arrearages of the year eighteen hundred and fourteen; changing only the form of his advertisements and his returns so as to suit the case.

46. And, whereas the lists of delinquencies which have been transmitted by the auditor to the clerks, in many instances contain lands and lots which have fallen into new counties, that have been created since the returns have been made for the non-payment of taxes; *Be it therefore enacted*, That the clerks of the old counties from which new ones have been stricken off, be hereby authorised and directed, on or before the first day of March, eighteen hundred

and fifteen, to certify and transmit to the clerks of the new counties, so created, and to the auditor of public accounts, correct lists of all such lands and lots, so far as they can be ascertained, with the credits certified by the auditor, or made by payments to themselves. The clerks of the said new counties shall deliver to the sheriffs thereof fair copies of the lists so certified at the same time at which they are hereby required to deliver to the sheriffs other lists of delinquencies. The sheriffs shall collect and account for the same in the same manner, in every respect whatever, as is herein prescribed in the collection of other arrearages of land tax in their said counties. The clerks of the several counties for failing to deliver any list or lists as aforesaid, shall be liable to a penalty of fifty dollars.

47. The clerks, for their services in making out and furnishing to the sheriffs and to the clerks of new counties, the lists aforesaid, shall be entitled to a fee of twenty-five cents for each tract of land or lot, contained in the said lists, to be paid by the delinquent person, to be charged on the land, collected by the sheriff, together with the arrearages, and accounted for by such sheriff, in the same manner that he accounts for other clerk's fees put into his hands for collection: *Provided*, That such fees shall not remain as a lien on any land or lot vested under this act in the literary fund.

48. All lands and lots sold, or vested in the president and directors of the literary fund, on account of delinquencies heretofore accrued, may be redeemed in the same manner as lands and lots so sold and vested, on account of delinquencies hereafter accruing. And the same time is hereby allowed to infants, femes coverts, persons insane, imprisoned or out of the Commonwealth, being engaged in the service of this State or the United States, to redeem the same after their disabilities shall have ceased.

49. Whenever, in any controversy respecting the title of any land or lot sold under this act, for the non-payment of taxes, it shall be alleged that any official return of the sheriff, made on oath, in pursuance of this law, is incorrect in any matter for which remedy is hereby given by motion of the party aggrieved, no evidence shall be received to establish such allegation, other than the judgment of a court rendered upon such motion, or the conviction of the sheriff for perjury, in the matter aforesaid.

50. The Executive is hereby authorized to employ such additional clerks as may be necessary to enable the auditor to comply with the requisitions of this act, at such salaries as they may prescribe, to be paid out of the contingent fund.

51. All fines imposed by this act, and not otherwise applied, shall be for the use and benefit of the literary fund.

52. Be it further enacted, That the act, entitled, An act concerning taxes on lands, passed the day of eighteen hundred and twelve, all other laws declaring lands to be forfeited for failure to enter them on the commissioners' books; and all acts and parts of acts coming within the purview of this act, shall be and the same are hereby repealed. And all forfeitures of lands for failure to enter them on the commissioners' book, shall be and the same are hereby remitted.

53. This act shall commence and be in force from and after the passing thereof.

This act has served as a model for all succeeding legislation for the assessment and collection of taxes both in Virginia and West Virginia. And, therefore, for reasons stated at the end of this brief, I have not given the legislation of the two States on the subject, as fully as I have done thus far.

MARCH 6, 1819.

On this day an act was passed entitled:

"*An act reducing into one, the several acts prescribing the mode of ascertaining the taxable property within the Commonwealth, and of collecting the public revenue.*"

*1. Be it enacted by the General Assembly*, That every county and corporation court within this Commonwealth shall annually, in the months of September or October, appoint discreet and reputable persons to be commissioners for the purposes hereinafter mentioned and the said courts are earnestly enjoined to make choice of most intelligent, honest and discreet men to perform the duties of those offices in their respective counties and corporations.

This first section changes the manner of the appointment of the commissioners of the revenue but the act makes no material change in their duties It comprises 93 sections and covers 24 pages of Vol. II of the Rev. Code of Virginia, of 1819.

TAXES--HOW TO BE COLLECTED.

Sec. 65. In case payment be not made by any person, chargeable with any tax, levy, fine or forfeiture or amercement, the sheriff or collector shall have power to distrain the slaves (if other sufficient distress cannot be had) goods or chattels which shall be found

upon the lands, notwithstanding such slaves, goods or chattels, shall be comprised in any deed or mortgage; but he shall make or take no unreasonable seizure or distress, upon penalty of being liable to the action of the party grieved, grounded upon this act, in which the plaintiff shall recover full costs, although the damages recovered may not exceed seven dollars.

Sec. 66. And in the collection of taxes due upon lands, the sheriff shall be authorized to distrain any personal property in his bailiwick, belonging to the person to whom such taxes are charged, or any personal estate on the land in the possession of such person, his tenant, or any other claiming title, by, through or under him; *provided* that the property of any person in possession of any part of a tract of land or lot, the whole of which stands charged to another, having a freehold title of record to that part, derived by, through or under that other, shall not be liable to distress for any taxes, on the residue of the land, having accrued subsequent to the date of such record; *and provided, also*, that the sale of any personal property, distrained upon the land for taxes due thereof shall convey only such title as the owner or occupier of such land held in such personal property.

Sec. 68. If the owner of the property so taken shall not pay such levy, fine, forfeiture or amercement, within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes, and the charges of distress and sale, for ready money.

Sec. 79. The sheriff or collector of taxes shall, at the time he returns a list of other insolvents, return a list of any land delinquent for the non-payment of taxes, and shall distinctly set forth that he could find no property within his bailiwick belonging to the person charged with such taxes, and that, after diligent inquiry, he could either not find any property on the land liable to distress, or could not ascertain the land so charged

80. The form of the sheriff's return of lands delinquent for non-payment of taxes shall be as follows: (*f*)

*List of Delinquencies in the Land Tax, in the County of* ——, *for the Year* ——.

| Name of Person. | Residence. | Estate held. | Quantity of land. |
|---|---|---|---|
| Description and local situation of land. | Distance and bearing from the court house. | Amount of tax. | Why returned delinquent. |

81. At the foot of such return, he shall take and subscribe the following oath or affirmation, which may be taken before any justice of the peace, and certified by him: (*g*)

I, A. B, sheriff (or deputy sheriff, as the case may be,) do solemnly swear (or affirm,) that the foregoing list of delinquencies in the land tax in the county of , for the year , is, as I do verily believe, correct and just; that I have received no part of the taxes therein returned delinquent; and that I have made diligent enquiry, for the purpose of finding property within my bailiwick, liable to distress for the said taxes, but have found none.

A. B., Sheriff of county,

Or, D. S., for ,

Sheriff of county.

82. The court of the county shall not allow, or certify in favor of any sheriff, any list of delinquencies in the land tax, which shall not be made out, sworn to subscribed in the form aforesaid; nor shall the auditor give any sheriff a credit for any such list of delinquencies which shall not be so made out, sworn to and subscribed, and which shall not, moreover, be allowed and certified by the court. No sheriff or collctor shall, at any time, be allowed to return any list of insolvents, or have any credit therefor, after eighteen months shall have expired from the period of the taxes becoming payable by such sheriff or collector, to which such list relates.

83. The sheriff shall make out three fair duplicates of such list, one of which he shall deliver to the clerk of the county court, at the time when the same shall be allowed and certified by the court; another he shall return to the auditor, when he settles with him for the taxes of that year; and the third he shall preserve himself during his continuance in office; and forthwith thereafter deliver the same over to his successor.

88. No lands or lots shall be exposed to sale for any arrears of taxes and damages due thereon, except in the manner hereafter to be provided for by law; but such arrears of taxes and damages shall continue to be a lien upon the lands and lots on which they are chargeable; and the sheriff, who shall be charged with the collection thereof, shall have full power and authority to collect the same, by distress or otherwise, from the owner of any such land or lot, or any tenant thereof, in the same manner as he would be authorized to collect any other taxes charged upon such land or lot. (*o*)

92 All and every act and acts, clauses and parts of acts, con-

taining anything within the purview of this act, shall be, and the same are hereby repealed; *Provided always*, That nothing herein contained shall prevent the collection and recovery of any arrearages of taxes due before the commencement of this act; but such arrearages shall be collected, paid and distrained for, and recovery had against all delinquents, and the damages on failure of payment thereof shall be the same, as if this act had not been made: And *provided*, That all rights and remedies, fines, penalties and amercements shall remain in the same condition as if this act had never been made.

93. This act shall commence and be in force from and after the first day of January eighteen hundred and twenty.

MARCH 10TH, 1832.

On this day an act was passed, entitled:

*An act concerning delinquent and forfeited lands, and provide for the sale of lands returned delinquent hereafter for the non-payment of taxes.*

Section *eleven* to *fifteen*, inclusive, of this act provide as follows:

11. The sheriff or collector of the revenue tax shall, at the August or September term of his county or corporation court, return to the said court a list of all lands and lots (other than those not ascertainable as aforesaid, or are improperly placed thereon) within his county or corporotion, which are delinquent for the non-payment of the taxes due thereon; and shall distinctly set forth, that he could find no property in his bailiwick belonging to the person charged with such taxes; and that, after diligent enquiry, he could not find property on the said land or lot liable to distress, sufficient to satisfy the taxes due thereon; which list shall be in the following form:

*List of lands and lots within the county of , delinquent for the non payment of the taxes due thereon for the year ,*

| Name of person. | Residence. | Estate held. | Quantity of land. | Description and local situation of land. | Distance and bearing from Courthouse. | Amount of Taxes. | |
|---|---|---|---|---|---|---|---|
| | | | | | | Dollars | Cents. |
| | | | | | | | |

At the foot of the return made in manner aforesaid, the sheriff or collector shall, in open court, make and subscribe the following

oath or affirmation: "I, A. B., sheriff (or deputy sheriff as the case may be) do solemnly swear (or affirm) that the lands and lots contained in the above list, are delinquent for the non-payment of taxes due thereon for the year ; that I have received no part of the taxes therein returned delinquent, and that I have made diligent enquiry for the purpose of finding property within my bailiwick liable to distress for the said taxes, but have found none. So help me God.

A. B. sheriff of county,
Or C. D., deputy sheriff for A. B. sheriff of county."

The court of the said county or corporation shall examine the said list, and being satisfied that it contains the truth, shall direct their clerk to certify the same to the auditor of public accounts, and to preserve the original in his office; and the said clerk shall make out a fair copy of said list and verification, which he shall deliver to the sheriff or collector who returned the same. The said sheriff or collector shall make out three fair copies of said list and verification, and shall, within ten days after making said return, set up at the courthouse door of his county or corporation, one copy of said return; and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county or corporation, and shall subjoin to each return a notification, that unless the taxes charged upon the lands and lots in the said list mentioned, shall be paid on or before the day of sale, that the said lands and lots, or so much thereof as shall be sufficient to satisfy the taxes due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same, will, on the first day of the next September or October court, at the courthouse of the said county or corporation, be sold at public sale.

12. The said sheriff or collector shall, pursuant to his notification, proceed on the first day of the aforesaid September or October term of his county or corporation court, before the front door of the said courthouse, to offer for sale each and every tract of land and lot in the said list mentioned, and by him advertised for sale, on which the taxes due thereon had not been paid, or so much of each and every tract of land and lot separately, as will satisfy the taxes due thereon, and the commission as aforesaid to the sheriff or collector. And the said sheriff or collector, not having time to complete the sale of the said lands and lots may continue his sale from day to day, for five days, without the intermission of a day, (Sundays excepted,) until such sales shall be completed (*b*)

13. The sale of the said lands shall be of each entire tract, separately, or of such quantity or part thereof as shall be sufficient to discharge the taxes charged thereon, with five per cent. to the sheriff or collector. When less than the entire tract of land shall be sold, the quantity sold shall be laid off in the manner hereinafter provided, at the expense of the purchaser, his heirs or devisees. And in the sale of lots, the sale shall be of each entire lot, or of such undivided interest therein, to be held by the purchaser, his heirs or devisees, as tenants in common, as shall be sufficient to discharge the taxes charged thereon, with five per cent. to the sheriff or collector.

14. Any lands or lots being offered for sale, for the non-payment of the taxes charged thereon in the manner aforesaid, and no person present bidding for the said lands or lots the amount of the taxes charged thereon, the sheriff or collector shall purchase in the same, in behalf of the commonwealth, for the amount of the taxes charged thereon, and they shall be vested in the commonwealth for the use and benefit of the literary fund, in the same manner as if conveyed by deed.

15. The sheriff or collector, on receiving from the purchaser the amount of the purchase money, shall grant to the purchaser a receipt for the same, after the following form:

*List of land sold for the non-payment of the taxes charged thereon, in the county of——, for the —— year ——, this — day of——, eighteen hundred and ——*

| Name of the person charged with the taxes | Quantity of land charged. | Local description of land. | Amount of taxes due. | Name of purchaser. | Quantity purchased. | Amount of purchase money. |
|---|---|---|---|---|---|---|
| | | | | | | |

Received of the above sum of , it being the amount of purchase money for the above land, sold for the non-payment of taxes due thereon for the year , pursuant to an act of assembly in that case made and provided.

A. B., sheriff of county,

Or C. D., deputy sheriff for A. B., sheriff of county.

(Necessary affidavit attached.)

FEBRUARY 27, 1835.

An act was passed entitled, *An Act further to extend the time of redemption of lands and lots returned delinquent for the non-pay-*

*ment of taxes west of the Alleghany Mountains, and for other purposes.*

1. *Be it enacted by the General Assembly*, That further time shall be allowed until the first day of July, eighteen hundred and thirty-six, for the redemption of all lands and lots heretofore returned as delinquent for the non-payment of taxes, west of the Alleghany mountains, and which became vested on the first of October last in the president and directors of the literary fund, and the said redemption may be effected by payment into the public treasury of the taxes in arrear and other legal charges, on the warrant of the first auditor, in the same manner as if no forfeiture had occurred: *Provided, nevertheless*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant claiming under a junior grant, whose rights are protected and secured under the provisions of the several acts which have heretofore passed upon the same subject, and are now in full force.

And whereas it is known to the general assembly, that many large tracts of land lying west of the Alleghany mountains which were granted by the commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years last past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

2. Be it therefore further enacted, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty-six, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such land or parcels thereof not now in the actual possession of such owner or proprietor by himself, or

his tenant in possession, shall become forfeited to the commonwealth, after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted.

3. *Be it further enacted*, That all right, title and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable *bona-fide* claimed, held or derived, from or under any grant of the commonwealth, bearing date previous to the first day of April, eighteen hundred and thirty-one, who shall have discharged all taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable; *Provided*, That nothing in this section contained, shall be so construed as to impair the right or title of any person or persons who have obtained grants from the Commonwealth for the same land and have regularly paid the taxes theron, but in all such cases, the parties shall be left to the strength of their original titles.

Section 4, 5, 6 of the act omitted.

7. It shall be the duty of the auditor of public accounts to keep a fair record of all lands and lots returned delinquent for the nonpayment of the taxes, and in the months of April, May or June, of the year 1840, and in the same months in every five years thereafter, to cause a list of the lands and lots so returned delinquent for each county and corporation (the taxes on which shall not have been paid as hereinafter directed), to be delivered to the sheriff or collector of the revenue for the counties and corporations respectively, with a statement of the taxes due on each tract or lot of land, with six per centum damages thereon, for each and every year the said taxes, or any portion thereof, may have been due and unpaid, and to charge the amount of taxes and damages due on such list to the sheriff or collector of the revenue, to whom the same may be delivered. The sheriff or collector of the revenue within twenty days after receiving such list, shall make out three fair copies thereof, and set up one copy at the front door of the court house, and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county

or corporation, subjoining to each copy a notification that unless the taxes and damages charged upon the lands and lots in said list mentioned, shall be paid on or before the day of sale, the said lands and lots, or so much thereof as shall be sufficient to pay and satisfy the taxes and damages due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same, will, on the first day of the next succeeding September or October court, between the hours of ten in the morning and four in the evening, at the door of the court house of said county or corporation, be sold at public auction.

8. The said sheriff or collector shall, pursuant to his notification, proceed to make sale of all lands and lots within his county or corporation, so as aforesaid returned delinquent for the non-payment of taxes, the taxes and damages on which shall not have been paid before the day of sale, and shall be governed in all his proceedings in making such sale, by the direction and provisions of the afore recited act, entitled, "act concerning delinquent and forfeited lands, and providing for the sale of lands returned delinquent hereafter for the non-payment of taxes." And if the sales be not finished on the day appointed in the advertisememt, they shall be adjourned from day to day, during the sitting of the court, and if not then finished, be adjourned till the first day of the next court, and then proceeded in between the hours and at the place above prescribed; and if such adjournment to the next court be made, notice shall be given by advertisement at the door of the court-house.

9. The taxes and damages due upon any lands and lots returned delinquent for the non-payment of taxes, shall be and remain a lien upon said lands and lots, until the same shall be fully paid and satisfied. It shall and may be lawful for any person or persons, having or claiming title to any lands or lots so returned delinquent, to pay the amount of taxes and damages due thereon into the treasury, on the warrant of the auditor of public accounts, at any time before the same shall be sold for the payment of the said taxes and damages.

10. *Be it further enacted*, That all lands and lots which may have been sold under the afore recited act, and purchased by the sheriff or collector, in behalf of the commonwealth, shall be embraced in the lists required to be made out by the auditor in the year eighteen hundred and forty, and shall again be offered for sale by the sheriff or collector in that year with other delinquent lands; and until the day of sale, all such lands so purchased in behalf of the com-

monwealth, shall be redeemable on warrant from the auditor, by payment of the taxes and damages into the public treasury.

11. When the sheriff or collector shall have completed his sales in the manner and at the periods prescribed by law, he shall render to the court of his county or corporation, a fair and distinct statement of his proceedings; in which statement shall be set forth the particular tracts or lots of land sold, and the amount of the purchase money, as well as such tracts or lots as shall have been offered for sale and not so'd for want of bidders; and the court being satisfied of the truth of said statement, shall certify the same to the auditor of public accounts. The sheriff or collector shall account for the nett proceeds of the sales, at the same period and under the same penalties prescribed in relation to the public revenue

In February, 1846, an act was passed appointing Messrs. *John M. Patton* and *Conway Robinson*, two of the leading lawyers of Virginia, to revise and digest the laws of the State into a Code, which they did, and their labors resulted in the Code of 1849; a single volume of 800 pages. And chapters 35, 36 and 37 provide, in the order stated, for the ASSESSMENT OF TAXES ON PROPERTY, the COLLECTION OF TAXES ON PROPERTY, and the SALES OF LANDS FOR TAXES.

And no material change is made in the laws in regard to either from what they were before. Taxes were assessed as before, and collected, where necessary, by distress, as before. And there was but little change in the law for the sales of lands for taxes, from what they were before. The law as to all these matters remained, without material change, in force to June 20, 1863, when West Virginia was admitted into the Union as a separate State.

It is a part of the public history of the country that when the State of Virginia seceded from the Union, the counties now composing the State of West Virginia (except those east of the Alleghany Mountains) seceded from the seceders, and declared themselves "the restored government of Virginia," and as such they were recognized by the Congress of the United States. And on the 3rd day of February, 1863, this restored government of Virginia passed an act, the first section of which provided as follows:

"1. Be it enacted by the General Assembly of Virginia, That all property, real, personal and mixed, owned by or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the

State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof situated within the said boundaries, and now vested in this State, or in the president and directors of the board of the literary fund, or the board of public works thereof, or in any person or persons, for the use of this State to the extent of the interest and estate of this State therein."

And *Article XI. Section 8, of the first Constitution of West Virginia*, provides, among other things, as follows:

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature." This constitution went into operation on the 20th day of June, 1863, when chapter 37 of the Code of Virginia was in full force and effect, and that chapter at once became the law of West Virginia, as to all the matters contained in it. And its provisions in reference to forfeited and delinquent lands, and lands purchased by the Commonwealth of Virginia or this State at sales thereof for taxes, and and the redemption thereof, have been incorporated, in terms, into every statute passed by the Legislature of West Virginia, on the same subjects."

In pursuance of the said act of February 3, 1863, the said first Constitution of West Virginia, article IX, sections 3, 4, and 5 provided as follows:

"3. The legislature shall provide for the sale of all lands in this State, heretofore forfeited to the State of Virginia for the nonpayment of the taxes charged thereon for the year one thousand eight hundred and thirty one, or for any year previous thereto, or for the failure of the former owners to have the same entered on the land books of the proper county and charged with the taxes due thereon for the said or any year previous thereto, under the laws of the State of Virginia, and also of all waste and unappropriated lands, by proceedings in the circuit courts of the county where such lands are situated.

"4. All lands within this State, returned delinquent for nonpayment of taxes to the State of Virginia since the year one thouand eight hundred and thirty one, where the taxes, exclusive of damages, do not exceed twenty dollars; and all lands forfeited for

the failure of the owners to have the same entered on the land books of the proper county, and charged with the taxes chargeable thereon since the year one thousand eight hundred and thirty one, where the tract does not contain more than one thousand acres, are hereby released and exonerated from forfeiture, and from the delinquent taxes and damages charged thereon."

5. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriffs' sales for delinquent taxes, and not released or exonerated by the laws thereof, or by the operation of the preceding section, may be redeemed by the former owners, by payment to this State of the amount of taxes and damages due thereon at the time of such redemption, within five years from the day this Constitution goes into operation; and all such lands not so released, exonorated or redeemed, shall be treated as forfeited, and proceeded against and sold as provided in the third section of this article."

The five years given by section *five* to the former owners of all such lands to redeem them "by the payment of the taxes and damages due thereon," expired on the 20th day of June, 1868, and no such owner, in or out of the state, availed himself of the privelege thus given him. At the time of the adoption of this constitution, the Code of Virginia of 1849 was in full force in Virginia, and by force of section 8 of article *eleven* of our constitution above quoted, that code became and was the law of West Virginia, until the Legislature of this State provided otherwise.

In 1869, March 4th, after the adoption of the Code of 1868, and before it was published, an act was passed requiring all owners of land to cause them to be entered and charged with taxes on the land books of the proper county, which act was incorporated into and became section 34 of chapter 31, of said Code, as follows:

LANDS NOT ENTERED IN ASSESSOR'S BOOKS FORFEITED.

"34. It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the state taxes thereon not charged to the owner for the year eighteen hundred and thirty-two, or any year thereafter heretofore or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right,

and interestof the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this State. Provided, however, that such owner may, within one year after the passage of this act, cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years."

But the owners of many large surveys refused to comply with this act, and in 1872, West Virginia adopted a new Constitution and incorporated the provisions of this section into that Constitution.

Article XIII, section 6, of that Constitution, reads as follows:

"6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land, or interest therein: *Provided*, such right to redeem, shall in no case extend beyond twenty years from the time such land was forfeited."

And thus, in this year of our Lord, 1872, the voters of West Virginia, at the polls, determined that the owners and claimants of these wild-cat surveys should in all future time, pay their taxes to the State, or forfeit whatever title they had or claimed to them.

And why, I ask, should they not be held to forfeit them, when they thus treat with contempt, the laws of the State in which these lands are situate?

After this period of five years had expired, it became and was the imperative duty of the Legislature of the State to provide by law for the sale of all forfeited lands, whether the forfeiture occurred for the failure of the owner to pay the taxes assessed thereon, or for his failure to have the land entered on the land books of the proper county for the year 1831, or any year previous thereto, as required by the statutes of Virginia, which then became the laws of West Virginia, where the owner had failed to redeem the land within the said five years or they were not exonorated from forfeiture by said section 4.

And in the year 1868, a Code of laws for the State of West Virginia, founded on the Code of Virginia of 1849, was adopted by the Legislature of West Virginia, which is called and known as the "Code of West Virginia." And chapters 29, 30 and 31 of this Code, are substantially the same as chapters 35, 36 and 37, of the said Code of Virginia, of 1849. There was a second edition of this Code of Virginia published, called the Code of Virginia, of 1860, but it was never adopted or authorized by the Legislature of that State.

And chapter thirty-one of the Code of West Virginia, providing for the sales of land for the non-payment of the taxes thereon, is the same in all its material provisions, as chapter 37 of the code of Virginia, and a statement of the provisions of said last named chapter, is the equivalent of a statement of the provisions of said chapter 37, of the code of Virginia. This chapter has been amended and re-enacted several times, and the sections of it to which I propose to call the attention of the Honorable Court, are from its re-enactment in 1882, which covers the period involved in the suit.

They are sections *four*, *five*, *six*, *seven*, *ten*, *eleven*, *twelve*, *thirteen*, *fourteen*, *thirty-one*, *thirty-two*, and *thirty three*.

*Of the proceedings for the sale of delinquent lands.*

4. On or before the first day of November, in the year one thousand eight hundred and eighty-three, and in every second year thereafter, the auditor shall cause to be delivered to the sheriff or collector of the taxes for every county, two lists of the real estate therein, which at the time said lists are made out, shall have been returned delinquent for the non-payment of the taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for State and State school taxes; county

taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes, and municipal corporation taxes for all purposes, on each tract or lot for each year, with interest on each amount from the twentieth day of January in the year succeeding that in which such taxes were levied, until the first day of November in the year such lists are delivered as aforesaid to the sheriff or collector, at the rate of twelve per centum added thereto. But if the real estate has been sold for the non-payment of taxes, the same shall not be charged with, or again sold on account of any tax for any previous year to that for the taxes of which the same was made; except, that if for any cause a previous sale of real estate purchased by or in behalf of the State, has been or shall be set aside by any court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists.

5. When by the formation of a new county or the change of the boundary between two counties, any tract or lot returned delinquent for non-payment of taxes in one county shall after such return, be included in another, the clerk of the county court of the county in which such land was included, shall certify the same to the auditor before the first day of June, in the year one thousand eight hundred and eighty-three, and before the same day in every second year thereafter, in order that the same may be entered in the list to be delivered pursuant to the preceding section, to the sheriff or collector of the county in which the said tract or lot is situated.

6. Within ten days after receiving such lists the sheriff or collector shall make out and cause to be published, once in each week for four successive weeks, in some newspaper published in the county, prior to the day of sale, an abstract of such list, in form or effect as follows :

*Sale of real estate for taxes.*

"Notice is hereby given that the following described tracts or lots of land in the county of ————, which are delinquent for the non-payment of taxes for the year (or years) 18—, will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the court house of said county, between the hours of ten in the morning and four in the afternoon

on the —— day of ———, 18—. Each tract or lot, or so much thereof as shall be necessary, will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

| Name of person charged with taxes. | Quantity of land. | Local description. | Total amount of taxes, interest, costs of publication and commissions, being amount necessary to redeem before sale. | Total amount of taxes, interest, costs of publication, commissions and fee for receipt. |
|---|---|---|---|---|
| | | | | |

"Any of the aforesaid tracts or lots may be redeemed by the payment to the undersigned, sheriff (or collector,) before sale, of the amount due thereon.

"Given under my hand this —— day of ———, 18—.

"A——— B———,

"Sheriff (or Collector.)"

The real estate mentioned in such list, or so much thereof as shall be sufficient to satisfy the taxes, with the interest on the same, and a commission of five per cent. on the whole amount to the sheriff or collector, shall be sold at public auction between the hours of ten in the morning and four in the afternoon, on the first day of the next November or December term of the circuit or county court of the said county, whichever may be held first after the posting of said list and the publication of said notice as herein required; or if no term of either court be held in said county in November or December, then on the second Monday in December next thereafter, unless the said taxes, interest and commissions are sooner paid to the sheriff or collector, or into the treasury of the State. He shall also as soon as such abstract is published the first time in a newspaper, as herein required, post one of the copies of the list received from the auditor, on the front door of the court house, with a like notice appended thereto. If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, said sale shall be commenced on the first day of a circuit or county court for such county, whichever may be held first in the succeeding year next after the publication of such

notice of sale." The balance of this section relates to other matters than the sale, and is omitted.

"7. If the said taxes, interests, costs of publication and commissions be not previously paid, the sheriff or collector shall proceed to make said sale, and if the same be not completed on the day named in the notice thereof, it shall be continued from day to day (Sundays excepted) between the hours aforesaid until it shall be completed.' The balance of the section relates to the suspension of the sale for reasons appearing to the sheriff and is therefore omitted.

Sections *eight* and *nine* omitted, because not necessary to be inserted.

### Receipts for Purchase Money—Return of Sale.

10. The sheriff or collector, on receiving from any purchaser the amount of purchase money, shall grant to him a receipt for the same to the following effect:

Memorandum of real estate sold in the county of ——, on this —— day of ——, eighteen ——, for the non-payment of the taxes charged thereon, in said county, for the year (or years) eighteen ——:

| Name of person charged with taxes. | Quantity of land charged in the county, in all the districts therein. | In what district or districts charged with taxes | Estate held therein. | For the year... | Amount of taxes due thereon for State and State school purposes, including interest and commissions. | For the year... | For the year... | Amount of county tax due thereon, including same. | For the year... | For the year... | Amount of school, district and independent school district taxes due thereon, including same. | For the year... | For the year... | Amount of other district taxes due thereon, including same. | For the year... | For the year... | Amount of municipal taxes due thereon; including same. | For the year... | Quantity of land sold. | Name of purchaser. | Whole amount paid for purchase money, fee for receipt and costs of publication. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | | | | | | | | | | | |

Received of —— the above sum of — —, it being the whole amount paid by him for the purchase money of the real estate

mentioned in this memorandum, including costs of publication and the fee for this receipt.

A—— B ——, Sheriff (or Collector)."

11. For the receipt provided for in the next preceding section the sheriff or collector shall be entitled to a fee of twenty-five cents, to be paid by the purchaser.

LIST OF SALES TO BE RETURNED BY SHERIFF, ETC.

12 The sheriff or collector who made a the sale, shall forthwith make out a list of sales so made, with a caption thereto in form or effect as follows:

"List of real estate sold in the county of ——in the month (or months, as the case may be) of —— —eighteen ———, for the non-payme t of the taxes charged thereon, in the said county, for the year (or years as the case may be) eighteen -——." Underneath shall be the several columns mentioned in the tenth section of this chapter.

AFFIDAVIT TO BE APPENDED TO LIST —RECORDATION OF SAME.

13. There shall be appended to such list an affidavit in form or effect as follows:

"I, A. B , sheriff (or collector or deputy for C. D., sheriff or collector) of the county of —— ———, do swear that the above list contains a true account of all the real estate within my county which has been sold by me, as well as a list of all the real estate redeemed, and the names of the persons who redeemed the same during the present year, for the non-payment of taxes thereon for the year ——, and that I am not now, nor have I at any time been, directly or indirectly, interested in the purchase of any of said real estate, so help me God." Which oath shall be subscribed and taken before some person authorized to administer oaths.

14. The lists of the sale and redemption of lands with the certificate of oath attached shall, within thirty days after the com pletion of such sale, be returned to the clerk of the county court, who shall within twenty days thereafter, record the same in a well bound book, and transmit the original lists of sales to the auditor. And if any sheriff or other officer whose duty it is to make out and return such list, shall fail or refuse to do as herein required, he shall be guilty of a misdemeanor, and fined not less than fifty nor more than five hundred dollars; and he and his securities in his official bond, shall be liable in an action on said

bond for all such damages as may be sustained by any person by reason of such failure; and such sheriff or other officer may upon the petition of any person interested be compelled by mandamus to make out and return such list and the proceedings thereon shall be at his cost.

Sections 15 to 30 relate to the redemption of land sold, and other matters not necessary to be inserted here.

### Lands Purchased by the State for Taxes.

31. When any real estate is offered for sale as aforesaid, and no person present bids the amount of taxes, interest and commissions due thereon, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest on the same, and shall make out a list thereof under the following caption:

"List of real estate charged with taxes and sold in the county of ——, in the month (or months) of ——, one thousand eight hundred and ——, for the non-payment of taxes due thereon for the year (or years) ——, and purchased for the State of West Virginia."

Underneath shall be the several columns mentioned in the tenth section, with a like caption to each column, omitting, however, the column headed "name of purchaser." The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the State during the year — , and return the list with a certificate of the oath attached, to the clerk of the county court within ten days after such sale, who shall within twenty days after such return record the same in a well bound book and transmit the original to the auditor. Upon receiving said list the auditor shall credit the sheriff or collector with the amount for which the real estate therein specified was purchased, but not with any commission thereon.

32. The auditor shall cause all the lists received in his office under the preceding section to be recorded in a well bound book, and all such estate, right, title and interest in the real estate mentioned in such lists as would have vested in an individual purchaser thereof at such sale, who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall be by the sale and the purchase on behalf of the State vested in the State, without any deed or other conveyance therefor to the State;

subject, however, to the right of redemption mentioned in the next section.

33. The previous owner of any real estate so sold and purchased for the State, his heirs or assigns, or any person having a right to charge it for a debt, may within one year from the sale thereof, redeem the same by paying into the state treasury the amount of all state, state school, county, school district, independent school district and other district taxes, and all municipal corporation taxes, with the interest due on each class of taxes at the time of such purchase, including such taxes as were or should have been assessed thereon for the year in which the same was sold and the cost of publication of such real estate in the delinquent list, together with such additional sums as would have accrued thereon for all of such taxes if the same had not been purchased for the State, with interest thereon at the rate of twelve per cent. per annum from the twentieth day of January in the year following that in which the same would have accrued.

Under the Code of Virginia, of 1849, the lands purchased for the commonwealth and not redeemed when West Virginia became a State, would, but for that fact, have been again offered for sale with the other lands to be sold for the non-payment of the taxes thereon But, by the provisions of the first constitution of West Virginia, already referred to, the title to such lands was vested absolutely in the State, and they were required to be sold, with the other lands mentioned in said Constitution, subject to redemption in five years from June 20, 1863.

### Of Distraining For Taxes.

By section *seven* of chapter 30 of the Code of West Virginia, the old remedy for the collection of taxes by distress was still provided for as follows:

7. Any goods or chattels in the county belonging to the person or estate assessed with taxes, may be distrained therefor after the first day of November, in the year for which the taxes were assessed; or before that day, if such goods or chattels are about to be removed from the county.

Thus, we see that from 1606 to 1896, a period of 290 years taxes have been collected in Virginia and West Virginia, by the summary remedy of distress and sale of property, and never, in either State by judicial process. The personal property book of the assessor made up under a general law passed by the Legislature of the State, and placed in the hands of the sheriff, being his only

authority for the collection of the taxes on personal property, and the land book of the assessor made up under the same law, and placed in his hands for the purpose, being his only authority for the collection of the taxes on lands. When the person charged with taxes on lands, or on personal property, or both, neglects or refuses to pay his taxes, the sheriff or collector, by virtue of the same general law, a law acting upon all persons alike, distrains the personal property of the person so refusing, and sells the same, if a sale becomes necessary, to pay the taxes, with the costs of distress and sale. And in case he fails to find personal property sufficient to pay all the taxes, he, by virtue of the same general law, returns a list of the non-payment of the taxes thereon to the county court of his county, as delinquent and swears to the truth of that return. A copy of said list is then posted at the front door of the Court House of the county, at least two weeks before the session of the county court at which it has to be presented to that court for examination. And when this list is examined and approved by said court, a copy thereof is certified by the clerk of the court to the auditor, who files and records the same in his office. And if the taxes on the lands mentioned in the list, with the interest thereon, are not paid at the auditor's office within the time required by law, a copy of said list is delivered to the sheriff or collector, and he proceeds to sell the real estate mentioned in said list for the payment of said taxes and interest with the costs attending the same, after giving the notice required by law. And if no person present will bid for the said lands a sum sufficient to pay the charges against it, the law requires the officer selling it to bid it in for the state. And if the land is not redeemed, by some person having a right to redeem it within the time required by law, it becomes the absolute property of the State.

And thus, the owner of the land is, by the mere operation of the statutes of the state, and without the judgment or action of any court, and without any sort of judicial proceeding or process, deprived of his lands *without his consent*: The statutes of the State and the continuous pratice under them for the period aforesaid, being "due process of law," and "the law of the land." And the highest courts in the land, both Federal and State, have sustained these and similar proceedings.

### As Due Process of Law in Proceedings by a State for the Collection of Her Taxes.

And the fact is, that no State in the Union is more interested in

maintaining this uniform policy and practice of the centuries than Virginia and West Virginia.

And I propose to call the attention of this Honorable Court to the cases decided by the Court of Appeals of that State and of this, in support of the contention of the defendants in error in the case at bar. And my first case, which is precisely in point, is that of

Staats vs. Board, 10 Grattan, 400–402.

This was a case arising under the act of the 27th of February, 1835, hereinbefore referred to. And the court unanimously sustained the validity of that act, in forfeiting the lands claimed by the plaintiff for the failure of the owner to enter the land sued for on the Commissioners' books, as required by said act.

Wild's lessee vs. Serpell, 10 Gratt, 405.

This was a case arising under the same statute.

And the court, speaking through Judge Lee, in a very able and well considered opinion, sustained the constitutionality of the act of February 27, 1835.

Hale v. Branscum, 10, Gratt. 418.

This was another case of the failure of the owner of the land in question, to enter it on the commissioner's books, as required by the said act of February 27, 1835, and the validity of that act was unanimously sustained.

Levasser v. Washburn, 11, Gratt 572, 581.

This was another case where the validity of the act of February 27, 1835, came in question, and by the unanimous decison of the court, its validity was sustained.

These cases came under review in the case of McClure v. Maitland, 24th West Virginia, 576.

In that case the court through Judge Snyder, say:

In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the commonwealth of Virginia, now embraced within this State, were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement of the population of the State to an almost inconceivable extent. In this emergency and to remedy this calamitous evil the General Assembly of Virginia inaugurated the system of delin-

quent and forfeited laws that form the basis of the provisions of our present constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the Legislature, the judiciary and the people, speaking through our present constitution, to destroy and annihilate the titles of such delinquent owners, who should after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect active settlers and those not in default. The purpose of the statutes passed to enforce this system was not merely to create a lien on these delinquent and unoccupied lands, but to effect by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes. The constitutional competency of the Legislature to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owners by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the court of appeals of Virginia." And they refer to the cases above cited.

Yorkum v. Fickey et al., 37 W. Va. 762.

This was another case where the validity of the act of February 27, 1835, came in question, and was sustained. See 3d point of syllabus, 762 and 772-3 of the case.

The record in this case, page 14, shows that the tract of 500,000 acres of land in question in this suit was not entered on the land books of the several counties in this State, in which it, or any part of is situated, or either of them, in the name of Henry C. King, the plaintiff in error, or in the names of Robert E. Randall, trustee, John R. Reed,trustee, John V. LeMoyne, John Joseph Marie, Schmidt Thornfeldt, August Marie, Noverre d'Sericourt, Louis Antoine Des Virges de Maupertures, A. D. Maupertures, Emile Dumas, Charles Dumas, nor David W. Armstrong, nor any, or either of them, for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, or for any or either of said years, and that no taxes on said tract of land, for the said years, or any or either of them, have been paid by the said plaintiff in error, nor by the said other persons named, or any or either of them.

The plaintiff in error, claims title to the land in question, under an alleged forfeiture of it, under the forfeiture laws of Virginia, passed prior to March 1838. And yet he claims that this same

character of laws, found in the Constitution and Statutes of West Virginia, are unconstitutional; that they are in derogation of the Constitution of the United States, and of the *fourteenth* amendment thereof. And that if these forfeiture laws *were* constitutional, prior to the adoption of that amendment, the laws of West Virginia on the same subject are in violation of the said amendment. We deny both of these contentions, and claim that this amendment has made no change in this respect. We claim that what was due process of law before this amendment, is still due process of law.

And we refer to the following cases decided by this Honorable Court in support of our contention:

Missouri Pacific Railway Co. vs. Humes, 15 U. S., 12,520,

This was an action brought by Humes, the plaintiff below, against the defendant, a Missouri corporation, to recover double its value in damages, for killing a mule, the property of the plaintiff below, of the value of $135.00. The action was brought in a State court, under a statute of the State, authorizing the recovery of double damages for all injuries to property injured or destroyed by a railroad corporation, as provided for by said statute. The case was tried by the court without a jury and decided in favor of the plaintiff. And judgment was rendered for the plaintiff for $270,00, twice the value of the property killed and costs. And the case was finally brought to this Honorable Court for review, on the ground that the statute in question was in conflict with the fourteenth amendment of the Constitution of the United States. And in a very able opinion of the court, speaking through Mr. Justice Field, the constitutionality of the State statute in question was unanimously sustained. In this opinion the court say:

"If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law. Within the present century, the punishment of death or long imprisonment was inflicted in England for many offences which are not now visited with any severer penalty than a fine or a short confinement, yet no one has ever pretended that life or liberty was taken thereby without due process of law. And it often happens

that heavy and oppressive burdens are imposed by statute upon residents of cities and counties, not merely to meet the necessary expenses of government, but for buildings and improvements of doubtful advantage, which sometimes, as in changing the grade of streets, seriously depreciate the value of the property. Yet, if no rule of justice is violated in the provisions for the enforcement of such a statute, its operation, in lessening the value of the property affected, does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say, that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from the State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."

Murry's Lessee vs. The Hoboken Land and Improvement Co., 18 Howard, 272, Vol. 1. Top page of Mr. Justice Miller's Edition, 227.

This was an action of ejectment for the recovery of land seized and sold by virtue of a warrant issued under an act of Congress against a defaulting revenue officer, in which it was claimed that the distress warrant was not "due process of law."

The Court, speaking through Mr. Justice Curtis, unanimously decided that it was.

The Court on top page, 230 of the case say: "That the warrant now in question is legal process, is not denied. It was issued in conformity of an act of Congress. But is it due process of law." And further along the Court say:

"To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process?" To this the answer must be two-fold.

We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the

English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due the crown, and especially those due from receivers of the revenues.

It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint

It declares: 'We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to suffice therefor," etc.

And the special attention of the Court is called to top pages 233–4 of this case.

And see Dent vs. West Virginia, 129 U. S. 114.

The syllabus of the case by Constitutional requirement, states the points decided by the Court. And the decision is in accord with the other cases cited.

Davidson vs. New Orleans, 96 U. S., p. 97.

This case, and the cases cited with approval in it, are, I very confidently submit, conclusive in favor of the constitutionality of laws and Constitution of West Virginia, which forfeits land for the failure of the owner thereof "to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon." I have not seen the brief of counsel for the plaintiff in error, and have no information of its contents. But I know from a bill of injunction lately filed by them to stay waste, that one of their contentions is, that it is not the fault of the plaintiff in error, but of the State of West Virginia, herself, that the land in question has not been entered on the land books of any of the counties in which it, or a part of it, is situated.

But with due deference I venture to suggest to the learned counsel, that the Constitution nor the statute, requires this duty to be performed by the State. The requirement is, "*It shall be the duty of every owner of land to have it entered on the land books*," etc. And the plaintiff in error not being either the State of West Virginia, or the representative of the State, if he acts at all, he must act for himself, and not for the State.

But the provision requires the owner of the land "to cause *himself* to be charged with the taxes thereon *and to pay the same*. And the learned counsel, I can hardly suppose, have claimed that the

State should have *paid* the taxes on the land, instead of the owner.

Hagar vs. Reclamation District No. 108, 111 U. S. 701.

This case is in accord with all the others. It decides, among other things, that a law authorizing the imposition of a tax or assessment upon property according to its value does not violate that provision of fourteenth amendment to the Constitution of the United States which declares that no State shall deprive person of property without due process of law, if the owner has an opportunity to question its validity or the amount of it either before that amount is determined, or in subsequent proceedings for the collection.

This is fully provided by our Code as will be seen below.

The fact is, that Robert E. Randall, Trustee, and all the other alleged owners of these 500,000 acres of land, have been the most successful taxdodgers, who have ever dodged the people of West Virginia.

When Randall made his so-called redemption of this tract of land, (for it was only a so-called redemption) he was required to enter said tract on the land books of said county, as directed by the constitution and laws of West Virginia, which he and all others including the plaintiff in error, have failed and refused to do from that day to this.

And I submit that this failure of Randall, Trustee, and of Reed, Trustee, to enter the said 500,000 acres of land on the land books of the county of Wyoming, or of any other of the counties aforesaid, and to cause it to be charged with taxes thereon, in the name of either of them, and to pay the said taxes on said land, as required by the constitution and statutes of West Virginia, was in law, if not in intention a voluntary abandoment by them, and each of them, of all claim whatever, to the said tract of land, and every part of it, in this State. And the people of the State gladly accepted of their said surrender.

The provisions of Chapter 29, of the Code of West Virginia for the relief of persons assessed, improperly with taxes, are as follows:

94. Any person claiming to be aggrieved by any entry in the land or personal property books of any county or by the assessment of a license tax in any county, may, within one year after the verification of such book, and within six months after the assessment of such license tax, apply for relief to the county court, of the county in which such books are made out, and, as to a license tax

of the county in which such tax was assessed. But he shall, before any such application is heard, give reasonable notice to the prosecuting attorney of the county, whose duty it shall be to attend to the interest of the State, county and district in the matter. If it appear on the hearing of such application that the value, quantity, distance and bearing from the court house, or the local description of any tract of land entered in such land book, is by mistake or fraud incorrectly entered therein, or that any tract or lot of land entered therein is, by mistake or fraud, charged with a greater or less amount of taxes and levies than should have been charged thereon, or that any tract or lot of land is entered and charged therein to any person who is not by law chargeable with the taxes thereon, or that the person properly chargeable with the taxes on any tract or lot entered therein is not so charged, or that there is any mistake in the name of the person charged with taxes on any tract or lot of land entered therein, the court shall by an order entered of record correct any and every such error or mistake, and direct its clerk to enter the same properly in the next land book made out by him. If the application be to correct an assessment of a tract of land the value of which was fixed by the assessor under the provisions of either section ten or section twenty-two of this chapter, or to correct an assessment of the value of a building made by the assessor under the provisions of sections twenty-seven or twenty-nine of this chapter, and it shall appear to the court on the hearing of the application that the assessment complained of is either too high or too low, the court shall correct the same and fix and enter of record the true value of such tract, lot or building according to the facts proved, and the clerk of such court shall make the proper correction in the next land book made out by him. If the application be to correct an entry made in the land books of one thousand eight hundred and eighty-one as to the value of any tract or lot as re-assessed in one thousand eight hundred and seventy-five, and not corected in that year or in the year one thousand eight hundred and seventy-six, and the court be satisfied on the hearing that the value thereof as so re assessed is too high, the court shall proceed in such manner as to it may seem best, and which in its opinion will be least expensive, to ascertain the true value of all the tracts and lots in the vicinity of that complained of, or elsewhere in the magisterial district wherein the tract complained of is, and shall correct the assessment of such and so many of such tracts and lots, including the one complained of, so as to equalize

the assessment of the whole thereof, and place each of such tracts and lots at its true value. But the court shall not in any such case so change the value of such tracts and lots as to reduce the aggregate value of the whole of the real estate in such magisterial district as the same appears on the said land books of one thousand eight hundred and eighty one. *Provided*, That if the real estate of any person, or of any mining, manufacturing or oil company has, by reason of floods or the abandonment of the works and property of such company been materially reduced since the said re-assessment made in one thousand eight hundred and and seventy-five, or since the correction thereof in that year, or in the year one thousand eight hundred and seventy-six, if any such correction was made, the value thereof may be changed and the true value placed thereon by the county court without regard to the aggregate value of the real estate in the district wherein such tract or lot is situated. Every order of a county court correcting an assessment of a tract or lot of land and reducing the value thereof so re-assessed in the year one thousand eight hundred and seventy-five, and entered in the land books of one thousand eight hundred and eighty-one, shall show that fact, and that the aggregate value of all the real estate in the magisterial district in which such tract or lot is situated is not reduced thereby, unless such value is reduced by reason of floods or the abandonment of the works and property of a mining, manufacturing or oil company, as aforesaid, and if for that reason, such fact shall be stated in the order. If neither of such facts be stated in the order, the auditor shall not allow to the party, the value of whose lands are so reduced, any exoneration for any of the taxes charged thereon. If the court, upon an application to correct an assessment under any of the provisions of this chapter, refuse to make the correction asked for, the applicant may have the evidence taken thereon, certified by the county court, and an appeal may be taken as in other cases, from the order of refusal to the circuit court of the county, and such appeal, when allowed by the court or judge, shall, except as hereinbefore provided, have preference over all other cases pending in such court; and whenever any such assessment is corrected as aforesaid by the county court or by the circuit court on appeal, the clerk of the county court shall, upon the delivery to him of a copy of the order of the court showing such correction, correct the land books accordingly, and charge up the taxes thereon, according to such corrected assessment, and the value of such real estate as so corrected shall con-

tinue until the same is changed pursuant to law. But no taxes assessed and charged upon real estate, the value of which has been lessened by reason of floods or the abandonment of works and property of any such person or company as is hereinbefore mentioned prior to such change, shall be released or refunded to the owner thereof

And now, without more saying, I respectfully submit, that the judgment of the court below shall be affirmed.

But I cannot close this brief without an apology to this Honorable court for its many imperfections. Although I appeared and entered the plea of all the defendants in this case, as well as in others, I did appear for the defendants in error in the court below, at the trial of the case as to them. And when it was suggested to me to submit this case at this term of the court under the rule I objected for want of time, and am not a party to the agreement. And the fact of the agreement having been made did not come to my knowledge, until it was too late for me to prepare a brief defending the interest of my many clients, whose interest in the question of forfeiture, are identical with that of the defendants in error. But I have done the best I could in the short time allowed me.

All of which is respectfully submitted.

JAMES H. FERGUSON,
Of Counsel for Defendants in Error.

No. 157. 157
Brf. of Ferguson for D.
Filed Oct. 12, 1897.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES,

## October Term, 1896.

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HENRY C. KING, Plaintiff in Error,

vs.

M. B. MULLENS, ALEXANDER McCLINTICK AND JOHN McCLINTICK, Defendants in Error.

---

ARGUMENT OF JAMES H. FERGUSON, OF COUNSEL FOR JAMES A. NIGHBERT, AND A LARGE NUMBER OF THE OTHER DEFENDANTS NAMED IN THE DECLARATION IN THIS CASE, IN SUPPORT OF THE DECISION OF THE COURT BELOW.

CHARLESTON :
DONNALLY PUBLISHING COMPANY.
1897.

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*Preliminary Statement.*

The proper style of this action is Henry C. "King vs. Simon S. Altizer, *et al.*"

It is one of several actions of ejectment brought by Mr. King, a citizen of the State of New York, against Simon S. Altizer and about one hundred and twenty others, citizens of West Virginia.

These actions are brought for the recovery of that part of a tract of 500,000 acres of land lying in the counties of Mingo, Logan, Wyoming and McDowell, in the State of West Virginia; the residue of the tract lying in the States of Virginia and Kentucky. These actions were brought in the Circuit Court of the

United States for the District of West Virginia, sitting in Charleston, in said District. And much the largest portion of this tract of land lies in West Virginia.

And in all these actions brought by Mr. King, there are, I suppose, about one thousand defendants. And this is but a beginning, if the contention of the plaintiff, King, is maintained by this Honorable Court, to wit: that all the laws of Virginia and West Virginia forfeiting lands for any cause, are unconstitutional and void. At the opening of our State courts on each morning, we hear the prayer of the crier, "God save the State of West Virginia," but if this calamity should befall us, this prayer will go up from the hearts of the people from one end of the State to the other. While I am the attorney and counsel for a large number of the defendants in this and the other pending cases, I am not the attorney of the defendants *in error*, and was not engaged, in anyway, in the trial of the case below. And among my clients are a large number of the defendants most largely interested in the affirmance of the judgment of the court below in this case.

But there was an understanding among the attorneys in all the cases, that they would assist each other whenever called on, when they could conveniently do so, in the progress of all the cases, and in pursuance of this understanding, I appeared for all the defendants named in the declaration in this case, when the same was filed at the March Rules 1895, in the Clerk's office of the Circuit Court of the United States, in the City of Charleston, my place of residence, and entered the joint plea of not guilty, for all of them, and had a rule entered against the plaintiff for security for costs.

Afterwards, the defendants *in error* elected to have their cases tried seperate from the others, and they appeared in court by their own attorneys and entered their own joint plea of not guilty. And at the January term of the said court, 1896, held in the City of Parkersburg, the case, as to them, was tried by a jury, and, by direction of the court, the jury found a verdict in favor of the defendants *in error*.

Printed record pages 9, 10, 11.

And on the 27th day of February, 1896, the court rendered and entered a judgement on said verdict, for the defendants *in error*.

Record, pages 11, 12.

The plaintiff filed *five* several bills of exceptions to the rulings and decisions of the court below in the trial before the jury. Record, pages 12 to 32. And without having moved for a new trial, as we are required to do in our State Courts, he filed his petition for a writ of error to the said judgement which was allowed

as prayed for, and the case is now in this Honorable Court for hearing on said writ.

And, inasmuch as the defendants I represent, are interested in the decision of this case to the same extent as the defendants *in error*, and have requested me to appear for them at the hearing of the case here in support of the judgement of the court below, I respectfully ask leave to appear in their behalf, and to submit the following:

## POINTS OF ARGUMENT.

### I.

*On the trial of this case in the court below the evidence given to the jury by the plaintiff was wholly insufficient, in any view of case, to entitle him to a verdict.*

All the evidence *given* and *offered* by the plaintiff to the jury, to maintain the issue on his part, is found in his *first* and *fifth* bills of exceptions. The evidence which these bills of exceptions plainly *show* that the plaintiff *gave* to the jury did not, as it seems to me, prove his case and entitle him to a verdict, in his favor. And if the evidence *offered* by him, as stated in both bills, should be treated here as *given* to the jury, I respectfully submit that it was not sufficient to entitle him to a verdict. The plaintiff s first bill of exceptions is as follows:

"HENRY C. KING,
*versus* } Ejectment.
SIMON S. ALTIZER, *et al.*,

Be it remembered, that upon the trial of this cause, the plaintiff to maintain the issue upon his part, introduced in evidence a certified copy of the grant issued by the commonwealth of Virginia, to Robert Morris, June 23d, 1795, for 500,000 acres of land then lying in the counties of Wythe and Russle, in Virginia, a large portion whereof now lies in West Virginia, in the counties of Mingo, Logan, Wyoming and McDowell, and in no other counties in West Virginia, which said grant is in the following words and figures, to wit:" Then follows the said copy of the grant in full, after which the bill of exceptions continues as follows: "That the plaintiff further offered evidence tending to prove that by sundry mesne conveyances and legislative and judicial proceedings, the title of said Robert Morris to the said tract of land, in

the year A. D. 1866, became vested in Robert E. Randall, trustee, on June 29th, 1886, in John R. Reed, trustee, and through sundry mesne conveyances of the said Reed, trustee, David W. Armstrong, and Jno. V. Le Moyne passed to plaintiff, Henry C. King, December 27th, 1893, and that defendants were in possession of and claiming title to parts of said land within the bounds of said tract and outside the reservation in said grant when this action was brought and at the time of trial thereof.

That the defendants, to maintain the issue on their part, offered in evidence to show an outstanding title in the State of West Virginia to said land, by forfeiture, a certificate of the auditor of said State of West Virginia in the following words and figures, to wit:

"STATE OF WEST VIRGINIA, }
"*Auditor's Office, Charleston.* }

"I, Isaac V. Johnson, auditor of the State of West Virginia, do hereby certify that neither Robert E. Randall, trustee, nor John R. Reed, trustee, nor John V. LeMoyne, Henry C. King, John Joseph Marie Schmidt Thornfeldt, August Marie Noverre d'Sericourt, Louis Antoine Des Virges de Maupertures, A. D. Maupertures, Emile Dumas, Charles Dumas, nor David W. Armstrong have entered on the land books of Wyoming, McDowell, Logan, Boone, or Mingo counties a tract of five hundred thousand acres of land for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, nor have either of them had said tract of five hundred thousand acres entered upon the land books of either or any of said counties for either or any of said years, nor have they or either of them paid any taxes upon said land for any of said years, within any of said counties, as appears from the records in my said office.

"I do further certify that said tract of five hundred thousand acres is not entered on the books of the assessor of any of said counties for any of said years.

"I do further certify that no land was entered on the books of the assessor of any of said counties for either of said years in the name of either or any of said parties.

"And I do further certify that none of the persons hereinbefore mentioned was charged on the land books of any of said counties with State tax on the land aforesaid or any part of it for the years aforesaid or any of them.

"In witness whereof I have hereunto set my hand and official seal this 29th day of October, 1895.

"I. V. JOHNSON,

[SEAL.] "*Auditor, State of West Virginia.*"

And plaintiff waived any objection to said certificate on account of the time of filing the same and offering the same in evidence and any want of notice of such filing and the intention to offer the same ; but to the introduction of said certificate in evidence plaintiff, by counsel, objected upon the ground that the same is not the best evidence nor any evidence of an outstanding title in said State to said land claimed by plaintiff, or of any forfeiture thereof or of any fact material to the issue in said cause ; which objection of plaintiff was overruled by the court and said certificate was admitted and read in evidence ; to which ruling of the court the plaintiff, by counsel, then and there excepted, and said exception was saved to him, and he prays that the same may be signed and sealed and made part of the record, which is accordingly done."

Printed record, pages 12, 13.

II.

*The certificate of the Auditor set out in the said bill of exceptions and read in evidence to the jury, was competent and sufficient evidence of all the facts stated therein, and was a complete defense for the defendants to the case made by the plaintiff at that time, and if no further evidence had been given by either party, the defendants would have been entitled to a verdict of not guilty.*

Sec. 5 of chapter 130 of the Code of West Virginia, among other things, provides as follows :

"The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands, or of their not having been entered on the books of the assessor of the county or counties wherein they were chargeable with taxes, shall, in any suit in relation to such lands, be *prima facie* evidence of what is stated in such certificate, provided it be filed with the papers in said suit and notice thereof be given to the opposite party or to his attorney, at least twenty days before the first day of the term at which it is to be offered in evidence. When the certificate purports to be signed by the auditor, it may be admitted in evidence without proof of his signature."

This certificate when read in evidence by the defendants to the jury, was a complete defence to them in any view of the case, as long as it remained uncontradicted by the plaintiff. And if the case had rested there, the defendants would, unquestionably, have been entitled to a verdict. The evidence, in addition to said certificate given by the defendants, was simply cumulative, of what had already been sufficiently proved by them, and whether competent or incompetent, it was wholly immaterial. If competent, it

did not help the defendant's case; and if incompetent, it did not injure the plaintiff. He was beaten without it. And the evidence, such as it is, set out in the plaintiff's *fifth* bill of exceptions in no way strengthens his case. This bill of exceptions is as follows:

"HENRY C. KING,
*vs:*
SIMON S. ALTIZER, *et. al.* } Ejectment.

Be it remembered that on the trial of this cause, and after the matters stated in the plaintiff's first, second, third and fourth bills of exceptions, and after the defendants had rested their case, the plaintiff, to prove that no forfeiture of the land, or outstanding title thereto, existed or was claimed by the State of West Virginia, and that there was no record of any forfeiture of said land where the same would be found if any such forfeiture did exist, introduced and read in evidence a certificate of the auditor of the State of West Virginia, dated Oct. 30th, 1895; which certificate is in words and figures following, to wit:

STATE OF WEST VIRGINIA:

AUDITOR'S OFFICE, CHARLESTON.

I, Isaac V. Johnson, auditor of the State of West Va., do certify that I have carefully examined the record books of forfeited lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, in said State, from and including the year 1883 to this date, 1895, and there does not appear on said record books a tract of 500,000 acres of land or any part thereof or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, Jno. R. Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of forfeited lands of this office for either or any of said years in the name of either or any of the said parties.

I do further certify that I have carefully examined the record books of delinquent lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, in said State, from and including the year 1883 to this date, 1895, and there does not appear on said record book a tract of 500,000 acres of land or any part thereof or any other tract delinquent for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, John R.

Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of delinquent lands of this office for either or any of said years in the name of either or any of said parties.

Given under my hand and official seal this 30 day of Oct. 1895.

I. V. JOHNSON,
*Auditor of West Virginia.*

That the plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claims title, and proved further that plaintiff was a purchaser of said tract of land for valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia or of any of the facts set out in the auditor's certificate shown and referred to in plaintiff's first bill of exceptions, except such notice as the land books and records duly kept disclosed.

That thereupon plaintiff rested his case and the defendant did the like; whereupon, at the instance of the defendants, the court instructed the jury as follows:

"The jury are instructed that the title to the land claimed by the plaintiff, granted to one Robert Morris by the Commonwealth of Va. by patent dated June 23rd, 1795, was (prior to the date of the deed made by John V. Le Moyne to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Va., forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To which instruction plaintiff, by his counsel, objected upon the ground that said provisions of the constitution of the State of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to wit, article XIV, sec. 1, of the amendments thereto, and other paramount and controlling provisions of said State constitution, to wit, Art. III, sec. 4, 5, 9, 10, 29, art. V., sec. 1, of the said constitution of the State of West Virginia, and upon the further ground that if there were a forfeiture of the said land to said State and an outstanding title thereto in said State it could not be set up against plaintiff in this action, who is a purchaser for value without knowledge or notice

of such forfeiture or of outstanding title; but the court overruled plaintiff's said objection and gave said instruction; to which ruling of the court in giving said instruction plaintiff, by his counsel, upon the grounds aforesaid, excepted, which is his second exception, and asked that said exception be saved to him and signed, sealed, and made a part of the record; and thereupon the jury, in accordance with said instruction of the court, proceeded to render a verdict, which is in the following words and figures, to wit:

"We, the jury, by direction of the court, find the defendants M. B. Mullins, Alexander McClintock, and John McClintock not guilty.

A. J. SMITH, *Foreman.*"

And the court thereupon proceeded to enter judgment upon the said verdict; which judgment is in the following words and figures, to-wit:

"This day came again the parties, by their counsel, and thereupon the defendants, by their counsel, moved the court to render judgment upon the verdict of the jury rendered on the 30th day of January, 1896.

"It is therefore considered by the court that the plaintiff take nothing by this bill, but, for his false clamour, be in mercy, &c., and that the defendants go thereof without day and recover of the said plaintiff their costs by them about their defense in this behalf expended."

To which rulings and action of the court the plaintiff, by his counsel, objected and excepted, and asked that said objections and exceptions be saved to him and signed, sealed and made part of the record in said cause, all of which is accordingly done."

This bill of exceptions is found on pages 29 to 32 of the record. And the attention of the Court is called to the fact that this bill of exceptions fails to certify at the point where the parties rested, or elsewhere, that the evidence given and offered was all the evidence given and offered in the cause.

So much of this last named certificate as relates to delinquent lands which become forfeited, alone, for the failure of the owner to redeem them when purchased in by the State, has no sort of application to this case. The record of these lands, as fully appears hereafter, is always found in the office of the Auditor. The delinquent lists are always returned there before the delinquent lands are sold for taxes. When any of these lands are bought in by the sheriff for the State at the sale thereof, a list of the lands so bought for the State is also returned to the auditor, and recorded by him in his office. But the case is entirely different with lands

forfeited to the State for the failure of the owner to have them entered on the land books of the proper county or counties, and charged with taxes in his name.

Section 31, of chapter *thirty-one* of the Code of West Virginia, provides as follows:

"31. When any real estate is offered for sale as aforesaid, and no person present bids the amount of taxes, interest and commissions due thereon, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest on the same, and shall make out a list thereof under the following caption:

"List of real estate charged with taxes and sold in the county of ———in the month of ———, one thousand eight hundred and ———, for the non-payment of the taxes thereon, for the year (or years)——— and purchased for the State of West Virginia." Underneath shall be the several columns mentioned in the tenth section, with a like caption to each column, omitting, however, the column headed 'name of purchaser.' The officer making out the said list shall make oath that it contains a true account of all real estate within the county purchased by him for the State during the year———, and return the list with a certificate of the oath attached, to the clerk of the county court, within ten days after such sale, who shall within twenty days after such return, record the same in a well bound book and return the original to the auditor. Upon receiving the said list the auditor shall credit the sheriff or collector with the amount for which the real estate therein specified was purchased, but not with the commission thereon." And section 32, of said chapter, provides as follows:

"32. The Auditor shall cause all the lists received in his office under the preceding section, to be recorded in a well bound book; and all such estate, right, title and interest, in the real estate mentioned in such lists as would have rested in an individul purchaser thereof, at such sale, who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall be by the sale and purchase on behalf of the State, vested in the State, without any deed or other conveyance therefor to the State; subject, however, to the right of redemption mentioned in the next section."

And the next section provides as follows:

"33. The previous owner of any real estate so sold and purchased for the State, his heirs or assigns, or any person having a right to charge it with a debt, may within one year from the sale

thereof, redeem the same by paying into the State treasury the amount of all State, State school, county, school district, independant school district and other district taxes, and all municipal corporation taxes, with the interest due on each class of taxes at the time of such purchase, including such taxes as were or should have been assessed thereon for the year in which the same was sold, and the costs of publication of such real estate in the delinquent list, together with such additional sums as would have accrued thereon for all such taxes if the same had not been purchased for the State, with interest thereon at the rate of twelve per cent, per annum from the twentieth day of January in the year following that in which the same would have accrued."

And so the court will observe that as to this class of lands when forfeited to the State on the failure of the owner or others named to redeem them from the forfeiture, there are two complete records as to every such tract, one in the office of the clerk of the county court, in the county where the land lies, and the other in the office of the Auditor at the capitol of the State.

But the provisions of the statutes of the State forfeiting lands for the failure of the owner to have them entered on the land books and charged with taxes in his name are entirely different.

Section 39, of chapter thirty-one of the Code of West Virginia provides as follows:

"39. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes thereon, and to pay the same. When for any five successive years, after the year one thousand eight hundred and sixty-nine, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such land books with a State tax on said land, then by operation of law, and without any proceedings therefor, the land shall be forfeited and the title thereto vested in the State But if for any one or more of such five years the owner shall have been charged with State taxes on any part of the land, such part shall not be forfeited for such cause." (More will be said as to this section further on.)

This is followed by an exception in favor of infants, married women and insane persons. But this exception is limited to 20 years from the time of the forfeiture. And said last named section further provides as follows: "A record of all real estate so forfeited which shall come to the knowledge of the Auditor shall be kept in his office, in which shall be shown the name of some former owner, or supposed owner, the quantity or supposed quan-

tity, and local or other description of the real estate, for what years the owner was not charged with the taxes, and when the real estate became forfeited. Such record shall be *prima facie* evidence that such owner was not for such years charged with the taxes on such real estate, and that he did not cause it to be entered and charged with such taxes, as aforesaid, and that the real estate was forfeited and vested in the State at the time specified. And in order to enable the Auditor to make such record, it shall be the duty of the clerk of the county court of each county in which such real estate ought to have been entered and charged with taxes as aforesaid, upon discovering any such failure to certify to the Auditor all the facts in relation thereto"

The court will, at this point, observe two things: *First.* The statute does not make the keeping of such record by the Auditor necessary to the validity of the forfeiture of the real estate, and *Second.* That such record *when* kept by the Auditor in his office, is but *prima facie* evidence of the forfeiture of the land to which it relates, and may, therefore, be contradicted. And the plaintiff neither proved nor offered to prove on the trial before the jury, that the facts as to such failure on the part of the owner to have the said land entered on the land books of the proper county and charged with taxes in his name, ever, at any time, came to the knowledge of the auditor, or was at any time "discovered" by the clerk of the county court, or, if discovered at any time by him, that he communicated them to the Auditor.

The certificate of the auditor read in evidence to the jury by the plaintiff, (record, pages 47, 48) would seem to imply that there were two separate record books of forfeited lands required to be kept by the auditor. But this is not so. The record of *forfeited* lands and of *delinquent* and *forfeited* lands, are kept in the same book, so far as the record of lands forfeited for non-entry on the land books is kept at all. The auditor says in his last named certificate "that I have carefully examined the record books of forfeited lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, in said State, from and including the year 1883 to this date, (1895), and there does not appear on said record books a tract of 500,000 acres of land, or any part thereof, or any other tract forfeited for any cause, in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, John R Reed, John R Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King." This part of the certificate simply corroberates the certificate of the same auditor given in evidence by the defendants, and proves nothing for the plaintiff.

His certificate as to the record books of delinquent lands returned and kept in his office is not evidence in this case for any purpose or for either party. This 500,000 acres of land not having been entered on the land books, in whole or in part, for any of the years from and including the years 1883 to 1895, in the name of any owner, or supposed owner, they could *not* have been returned delinquent, and no record of this tract as *delinquent* and *forfeited* lands could have been made.

Following this certificate the said fifth bill of exceptions says: "That the plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claims title, and proved further that the plaintiff was a purchaser of said land for a valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia, or of any of the facts set out in the Auditor's certificate shown or referred to in plaintiff's first bill of exceptions, except such notice as the land books and records duly kept disclosed." And here both parties rested their cause.

The evidence *offered* by the plaintiff as stated in this last bill of exceptions, even if *given* to the jury, neither proved nor tended to prove any fact material for him in the case. If it had been true "that all taxes of the State of West Virginia charged and chargeable upon said tract of land up to and including the year 1883, had been fully paid and discharged by Robert E. Randall, trustee," (which, allow me to say, it *was not*) it in no way even tended to support the plaintiff's title to said land. This tract of land was off the land books in all the counties in which it was situate in 1883, and prior thereto, or it could not have been in a state of forfeiture. And the said certificate of the auditor shows that it remained off the land books of all the said counties from and including the year 1883 to and including the year 1895, the date of said certificate. And, without counting the year 1883, the tract of land in question became forfeited for non-entry on the land books at the end of the year 1888, and is still in a state of forfeiture. And it must and will so remain until the owner or supposed owner thereof shall, if ever, redeem it from such forfeiture by proceedings in the circuit court of the proper county as required by law.

And as to the plea set up for Mr. King by his attorneys that he was an innocent purchaser of the land in question for a valuable consideration, and without notice of the claim of title by the State of West Virginia, to the land in question, it is too frivolous to re-

quire any sort of argument to expose it. Mr. King can't *pose* as an *innocent* purchaser of this tract of 500,000 acres of land in an old settled country, and occupied as this tract is by other claimants of title to parts thereof, from centre to circumference.

And now, coming back to section 39, of chapter thirty-one, of the Code of West Virginia, forfeiting lands for the failure of the owner to have them entered on the land books and charged with taxes in his name, for any five successive years, after the year 1869, and the record of such forfeiture thereby required. The auditor, as we have seen, certifies that he had diligently examined the records of forfeited lands kept by him in his office, &c., and that he found no record of the forfeiture of the land in question in either of the counties of Logan, Mingo, Wyoming, or McDowell. Of course, he did not find any such record, and in order that this court may see and understand *why* he found no such record, their attention is respectfully called to some other provisions of the Code of West Virginia, which will explain the matter.

The Code of West Virginia of 1868, required both the land and personal property books of each county in the State, for each year, to be made out and certified by the assessor of each assessment district in the State; some counties having more than one assessment district.

In 1881, chapter *twenty-nine* of the Code of 1868, was amended and re-enacted by the Legislature, and section *eight* of said chapter as amended, reads as follows:

"8. The land books for every county shall hereafter be made out complete by the clerk of the county court of such county. In making said land books in each year he shall be governed, as far as is proper, by the copy of the land books last made out in his county used by the assessor or assessors therein in making his or their assessments for the year, and the entries made therein by him or them, and returned to him as required by this chapter. But he shall correct errors and mistakes which he may discover in any such land book as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes thereon or otherwise. He shall also correct all errors and mistakes he may find in such land books as to the distance and bearing of any tract of land from the court house or in the local description thereof, and all clerical errors of every sort which he may find therein. Mistakes, errors and improper entries in the land books after they are made out, corrected

and certified as provided in this chapter, shall be corrected in the manner provided in sections ninety-four and ninety-five of this chapter. For making out the land books as required by this chapter the clerk of the county court shall receive a reasonable compensation, to be fixed by the county court, and paid out of the county treasury.

Sections 75, 76 and 77 of this chapter, as amended, provides for the examination and correction of both the land and property books, after they are made out, and after such correction, three copies of each book are to be made out and their correctness verefied; the copies of the land book, by the clerk of the County Court, and the copies of the personal property book, by the assessor. And section 78 of said chapter provides as follows:

"78. As soon as such comparisons and corrections have been made the Clerk of the County Court shall make and subscribe the following oath at the foot of each of the land books: I ———, Clerk of the County Court of ——— county, do swear (or affirm) that in making out the foregoing land book, I have to the best of my knowledge and ability, pursued the law prescribing the duties of clerks of county courts. And that I believe the entries, additions and recapitulations are correct and like the two other copies of the land book made by me for my county, for the present year. And the officer before whom the oath is taken shall annex thereto the following certificate: Sworn to and subscribed before me a ——— for the county of ———, on the —— day of———, which certificate shall be subscribed by the officer making it."

Sections 79 and 80 of said chapter 29 provide for the delivery of one copy of the land and property books to the clerk of the county court, and another copy of each of said books to the sheriff or collector of the county, and section 81 of said chapter provides as follows:

"81. The remaining copies of each of said books shall be transmitted by the assessor and clerk of the county court respectively to the auditor on or before the first day of October, with a certificate, affixed thereto or written thereon, stating that he has deliivered duplicates thereof to the sheriff or collector of the county, and the time of such delivery. The said copies shall be a guide to the auditor in auditing the accounts of such sheriff or collector; and shall be admitted as evidence in any proceeding against such sheriff or collector, in relation to the taxes entered therein."

By this section 81 of chapter 29 of the Code of West Virginia, one copy of the land book of every county in the State, for each and every year, is transmitted to the auditor by the clerk of the

county court on or before the first day of October in each year, and is there filed and preserved by him, but is not recorded in any book in his office; these land books themselves, with the certificate of the clerk of the county court required by section 39 of chapter thirty one of the Code of West Virginia, when furnished him by such clerk, being all that is necessary to enable the auditor to make the record of lands forfeited for non-entry for any five successive years after the year 1869, on the land books of the proper county or counties. And without this certificate of same one or all of the clerks of the county courts of the counties in which this tract of land was situate and chargeable with taxes, it was impossible for the Auditor to make the record required by said section 39 of chapter 31 of the Code of West Virginia, except when his attention was called to matter by the application of the parties to this suit for the certificates he gave them to be used in evidence at the trial of this case.

And when so called on, all he had to do to enable him to give the certificate which he gave was to examine the land books on file in his office for the years 1883 to 1895, inclusive, of the counties above named, to enable him to certify the facts which he stated in each certificate. Both of these certificates show that the owner, or supposed owner, of the land in question did not have it entered and charged with taxes in his name, as required both by the Constitution and laws of the State of West Virginia, for *more* than five successive years after the year 1869, to wit: for the years from and including the year 1883, to and including the year 1895, the date of both certificates, and that the said 500,000 acres of land, without counting the year 1883, was forfeited to the State of West Virginia at the end of the year 1888, and five years before the date the plaintiff's deed from Le Moyne, which his first bill of exceptions shows bears date December 27, 1893. And the record shows, p. 1, that his declaration in the case was filed at the March Rules, 1895, when the land in question was still off the land books. At the close of the evidence in the case, the court, at the instance of the defendants, instructed the jury to find a verdict for the defendants, which they did. The plaintiff excepted to this instruction given by the court, which is stated in full in his said *fifth* bill of exceptions, for which see printed record, pages 29 to 32.

The grounds of his said exception, as stated therein, are as follows:

"That said provisions of the Constitution of the State of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to wit:

Article *XIV*, Sec. 1, of the amendments thereto, and other para-

mount and controlling provisions of said State Constitution, to wit: Art. III, Sec. 4, 5, 9, 10, 20, Art. V. Sec. 1, of the said Constitution of the State of West Virginia, and upon the further ground that if there was a forfeiture of the said land to the State and an outstanding title thereto in said State, it could not be set up against the plaintiff in this action, who is a purchaser for value without knowledge or notice of such forfeiture or of outstanding title."

Fearing that I might lay myself liable to the charge of professional discourtesy if I were to characterize this last ground of error as simply nonsense, I will not do so, but will pass it by without further notice. As to that part of the exception which claims that Section 6, of Article XIII, of the present Constitution of West Virginia, is repugnant to and in conflict with other paramount and controlling provisions of said State Constitution, towit: Art. III, Sec. 4, 5, 9, 10, 20, and Art. V, Sec. 1, of said Constitution of West Virginia." It requires but a brief notice to show that there is nothing in it. The only section of either article of the State Constitution referred to, which I deem necessary to notice, is section 10, of Article III, which reads as follows:

"10. No person shall be deprived of life, liberty, or property, without due process of law, and the judgement of his peers."

This section as it reads *now* in the Constitution of West Virginia seems to be in conflict with the Constitutional provision referred to, in the exception, but it is not so in fact.

The question has been twice before the Supreme Court of Appeals of West Virginia, and in both cases that court unanimously held that section 10, of Article III of our State Constitution, when properly construed, was in harmony with the alleged conflicting provisions of the same constitution. The two cases to which I allude, in which the proper and legal effect of this section 10, of Article III, has been adjudicated, are *Keystone Bridge Co. vs. Summers, et al.*, 13 West Va. 476, and *Jelly vs. Dils and Smith*, 27 West Virginia 267, 274.

In the case of *Jelly vs. Dils and Smith*, our Supreme Court of Appeals, speaking through Judge Green, says:

"The only other provision of our Constitution which it is claimed they (the ordinances of the town of Moundsville) violate, is Sec. 10 of our bill of rights, which is: 'No person shall be deprived of life, liberty or property, without due process of law and the judgment of his peers." What is meant by *due process of law?* Justice Edwards said, in *Watervelt v. Gregg*, 12 N. Y. 209: "*Due process of law* undoubtedly means in due course of legal proceedings,

according to the rules and forms, which have been established for the protection of private rights." And by *judgment of his peers* is meant a trial by jury. In the constitution of many of the States, instead of the phrase due process of law, we find the phrase *the law of the land*, which it is universally agreed, means the same thing; and in a few of the States the phrase *due course of law* is used instead of *due process of law*, which it is also agreed means the same thing. The phrase *judgment of his peers* is omitted in the provisions of the constitution of many of the States. But its omission, as we shall presently see, does not alter the meaning of the provision. In all the Constitutions which I have examined, where both these phrases *due process of law* and *judgment of his peers* are used, these are connected together by the disjunction *or*, so that this provision of the Constitution reads: "No person shall be deprived of life, liberty or property without due process of law or the judgment of his peers." Why in our Constitution the copulative *and* was used instead of the disjunctive *or*, it is difficult to concieve, unless it was a mere clerical error, which I suspect to be true. It obviously did not mean that no person shall be deprived of life, liberty or property without a trial by jury; for there never has been a time in this State or in any other State, or in England, in which it was held indispensible that to deprive a man of his life, liberty or property, he should in all cases have a trial by jury. And in truth it would be utterly impracticable to carry on any government, if this construction was placed on this provision of the Constitution, and it was habitually acted upon. Every day men are, and have been for hundreds of years past, deprived of their property by decree in chancery. In fact, men are much oftener, and to a much greater extent, deprived of their property by decrees of court than by the verdict of a jury. Men, too, are habitually deprived of their property by distress for taxes or distress for rent and for fee-bills without a trial by jury." And further along the Court say:

"Our constitutional provision must then be interpreted to mean the same as the constitution of other States; and the word *and* used in it, be interpreted to mean *or*. This must be its true interpretation, our constitutional convention intending to make no change in this fundamental principle of our government, and meaning only that no person should be deprived of his life, liberty, or property without a trial by jury in those cases, where a trial by jury had been theretofore regarded as proper, and had been the recognized and established proceeding."

And now, reading this 10th section of our bill of rights, as the Court of Appeals say in this case it must be read, it is as follows :

"No person shall be deprived of life, liberty, or property, without due process of law, *or* the judgment of his peers."

And this, I respectfully submit, effectually disposes of this part of the exceptions; none of the other sections of the Constitution of the State referred to having any bearing upon the question.

## III.

*Neither the provisions of the Constitution of the State of West Virginia, for the forfeiture of lands, nor the statutes of the State passed to carry said provisions into effect, are in conflict with the fourteenth amendment of the Constitution of the United States.*

The discussion of this point involves the great and important question in this case, viz:

WHAT IS DUE PROCESS OF LAW IN PROCEEDINGS BY A SOVEREIGN STATE IN COLLECTING HER TAXES?

And this question is of vital and paramount importance to the people of West Virginia. Her laws forfeiting lands and vesting the titles of the owners thereof in the State for their failure to pay the taxes assessed against them thereon, and for their failure for any five successive years since 1869, to have them entered on the land books of the proper county or counties, and charged with taxes thereon in their name, are all based upon the laws of Virginia, her Mother State.

And my knowledge of the land titles in West Virginia, acquired in a practice of the law for 57 years, enables me to say, that at least, one-half of the titles of the people of West Virginia to the lands held by them, date back to the forfeiture of the large surveys made prior to the year 1800, and afterwards abandoned by their owners, and forfeited by the laws of Virginia, for the reasons aforesaid. No greater disaster could befall the people of West Virginia in regard to the titles to their lands, than a decision of this Honorable Court declaring that the laws of both States forfeiting lands therein were and are unconstitutional and void. And in view of the high and abundant authorities, including the many decisions of this Honorable Court in favor of their validity, I cannot anticipate such a decision.

Judge Cooley, in his work on Constitutional Limitations, 2nd Edition, page 357, says:

"Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all

the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will be discussed separately, and it will appear that under each the law of the land sanctions devesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is an inherent authority to appropriate the property of the citizen for the necessities of the State, and Constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse."

And on page 353 of the same edition he says:

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general laws which govern society. Every thing which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

And on this definition Judge Cooley comments as follows:

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

And the Dartmouth College case, in which Mr. Webster gave this definition was the common law action of *Trover* in which the defendant pleaded *not guilty*, and the case was tried by a jury. The validity of a statute of the State of New Hampshire was involved in it, but the statute in question was held by this Honorable Court to be "a law impairing the obligation of a contract." And in discussing the power of taxation, on page 479 of the same edition, Judge Cooley says:

"The power to impose taxes is so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatsoever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of government affect more constantly and intimately all the relations of life than through the exactions made under it.

"Taxes are defined to be burdens or charges imposed by the leg-

islative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not."

And in his "Treatise on the Law of Taxation," commencing on page 47, 2nd edition, Judge Cooley, speaking of the words, "Law of the Land," says: "There is a constitutional guaranty which has come to us from Magna Charta, which declares that no person shall be deprived of life, liberty or property, except by the judgment of his peers or the law of the land. The alternative provisions of this guaranty have sometimes been supposed to mean the same thing, and the guaranty itself to entitle every person to have any demand made upon him, tried by a jury of the vicinage. Such a construction applied in tax cases would work a thorough and radical change in the principles on which taxation is now supposed to rest. It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve, to a review and possible reversal at the hands of a jury.

It would not so much strengthen the judicial department as it would weaken the legislative; for the courts themselves, though juries sit with and as a part of them, are compelled to recognize a large degree of independence in the action of these assistants. Such independence is often useful, and never can be seriously detrimental when a verdict determines a single controversy only; but to make juries the assessors of the claims of the State upon individuals could only introduce anarchy; one jury reaching one conclusion regarding the public needs and the justice of its demands, and another, until the State would be without general rule, and must fall to pieces from the incurable insuficiency of its government. Such a construction of a clause agreed upon as an important provision in a charter of government can never have been intended.

It has long been settled that while one is to be protected in his interests by the 'law of the land,' he has a right to 'the judgement of his peers' only in those cases in which it has immemorially existed, or in which it has been expressly given by law. The clause cited from Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is

of itself the law of the land. And an act for levying taxes and providing the means of enforcement is as we have seen within the unquestioned and unquestionable power of the 'legislature.'

It is, therefore, the law of the land not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for, in order to give the rule full operation. As has been well said, the mode of levying as well as the right of imposing taxes is completely and exclusively within the legislative power, which it is to be presumed, will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial, would materially impede, if not wholly obstruct, the collection of the revenue." Further along he says: "This subject has acquired additional importance since the adoption of the fourteenth amendment to the Federal Constitution, which provides, among other things, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

Since this amendment, whenever it is claimed that a revenue law, either in intent or in administration, deprives the owner of his property without due process of law, or takes from any person his right to the equal protection of the laws with all others, a Federal question may be raised upon which the decision of the Federal Supreme Court will be authoritative and conclusive: It is, therefore, of high importance to know what that Court has decided under this amendment in tax cases."

And on page 432, speaking of the collection of taxes, Judge Cooley says: "Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of State necessity. Without them it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the

constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the State might be deprived of the resources for continuing its existence and performing its regular functions until a revenue was collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties."

And on page 438, speaking of the collection of taxes by *distress and sale af chattels*, he says: "It has been well said of collection by distress: This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence. It has been continued by all the States since their independence, and has existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation. This is conclusive of the right to provide for it."

And now I propose to show that the practice of collecting taxes by the distress and sale of property prevailed in Virginia from A. D. 1629 to A. D. 1863, when West Virginia was created out of a part of her territory and became a State of the Union, and in West Virginia, from that time to the present. And that for many years during that period, real estate, as well as personal, was distrained and sold by the collector of taxes, alike, for the payment of the taxes thereon.

The first charter of the colony of Virginia bears date the 10th day of April, 1606, and the little knowledge we have of the government of the colony from that date to 1629, is derived from a manuscript preserved by Peyton Randolph, and sold, with his library by his executor to Thomas Jefferson.

This manuscript is published in Hening's Statutes at large, beginning on page 137, of volumn 1. It contains the proceedings of the first legislative assembly of the colony of which we have any knowledge, and was convened on October 16, 1629.

Their proceedings as recorded in that volumn show that they were neither experts in drafting statutes, nor well up in the matter of orthography. But they knew what they wanted and provided for it as well as they could. They put no title to the acts they passed nor in any way noted the dates of their passage further than to give the month and year, and the year of the reign of the King in which they were passed. Their manner of doing business is shown in the first act they passed, as follows:

## ACT. I.

After debate of many matters, it was *thought a business of great benefit and good consequence* to send and maintain a company of men to plant *corne* at Kyskyache, the charge of building to be borne equally by all that shall be adventurers, and to *bee* there seated by the 15th of November next, whereupon *voluntarily*, the Governor offered 3 men, Captain Mathews 4. "(and so on until 27 men in all were offered by those present), "it was ordered that they should have shares of land to them and their heirs."

And on page 142, of the same volumn we find the first act passed by this legislature assessing a tax for the support of the government of the colony, and providing for its collection.

The following is the act so passed,

"OCTOBER, 1629—5TH JAMES 1ST.

"ACT VI.

This act first allows quite a number of claims due to sundry individuals, and provides for their payment, as follows:

"To defray all of the charges above said, the whole assembly concluded that there should be five pounds of tobacco per *pol* levied through the colony. And it was further concluded and ordered that every master of a family, and that every freeman that is to pay five pounds of tobacco per *pol* as aforesaid for defraying the *publique* charges, shall bring the same unto the Houses of the Burgesses of the plantations within two days after notice thereof given unto them. And if any shall fail to bring the same, it is thought fit that by virtue of this order the said Burgesses shall have power to levy the same by distress upon the goods of the delinquents, and to make sale of the said goods, and to detain such tobacco which shall be due by this order, and for their fees in making this distress, restoring to the owner of the said goods the residue and remainder. And if the Burgesses shall make neglect herein, they shall be fined by the Governor and Council.

The Burgesses *doe* undertake to provide caskes to *putt upp* the same, and if any damage shall befall unto the tobacco, it shall not light upon the Burgesses, unless they shall be faulty therein.

All the Burgesses are with all convenient speed to send to the Governor a list of the tithable persons within their plantations, that thereby the Governor may appoint those that are creditors of this tobacco, to receive it, and that he take order to have the account kept of the same."

And thus it appears that the first legislative act of the colony of

Virginia imposing a tax for the support of her colonial government, of which we have any knowledge, provided for its collection by the summary remedy of distress and sale of the property of the delinquent tax-payer. And the attention of the court will now be called to the following series of acts of Virginia and West Virginia, providing for the collection of their taxes without any sort of *judicial* process. All my references for the statutes named will be to Henings Statutes at Large, until notice is given to the contrary.

MARCH, 1645.—21st CHARLES 1st, Vol. I, pp. 229–30.

ACT XXI.

*Be it enacted by the Grand Assembly, and the authority of the same.*

"That all levies that shall accrue from the *publique* shall be satisfied by the last of November following. And in case of nonpayment that the sheriff be enabled to make seizure of the tobacco of the delinquent which in all probability will not be disposed of before that time, whereby the *publique* credit may be better preserved and the creditors satisfied in kind."

OCTOBER, 1646.—21st CHARLES 1st, Vol. I, p. 337.

ACT XXIII.

This Act, after reciting the necessity for its passage, reads as follows:

"*It is therefore enacted by the Grand Assembly*, That the sheriff of the several counties respectively, do levy, if occasion be, by distress, and make such payments to such persons and for such debts as are hereunder mentioned."

MAY, 1730,—3RD AND 4TH GEORGE 2D, VOL. 4, pp. 255–6.

CHAPTER XV.

At this session the first act with a title at its head was passed as follows:

"*An Act for Raising a Public Levy.*"

"*Be it enacted by the Lieutenant Governor, Council and Burgess of the present General Assembly, and it is hereby enacted by the authority of the same.*

The 21st section of this act reads as follows: "And to the end

that the *publick* county and parish levies, secretaries, clerks and other officers-fees may be discharged in due time, Be it further enacted by the authority aforesaid, That during the continuance of this act, all public county and parish levies, quit-rents, secretaries, clerks, surveyors and other officers fees, payable in tobacco, shall be paid and satisfied by the persons, chargeable with and indebted for the same, to the sheriff or other collector, by inspectors notes before the tenth day of April, yearly. And if any person chargeable with the dues or fees aforesaid, shall neglect or refuse to pay the same within the time aforesaid, it shall and may be lawful to and for the sheriff or other collectors, immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof for tobacco, in the same manner as is directed by law for goods taken in execution."

MAY, 1742,—15TH GEORGE 2ND, VOL. 5, pp. 124, 138–9.

## CHAPTER I.

Section 28 of this Act reads as follows:

"28. *And be it further enacted*, That all public, county and parish levies, quit-rents, secretary's, sheriff's, clerk's, surveyor's and other officers' fees payable in tobacco, shall be paid and satisfied by the person chargeable with, and indebted for the same, to the sheriff or other collector, by inspectors' notes, before the tenth day of April, yearly. And if any persons chargeable with the levies, quit-rents, and fees aforesaid, shall neglect or refuse to pay the same, within the time aforesaid, it shall and may be lawful to and for the sheriffs or other collectors immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof, for tobacco, in the same manner as is directed by law for goods taken in execution. And the overplus (if any be) after paying the said levies, quit-rents and fees, which is hereby declared to be the same as for serving any execution, shall be returned to the debtor."

OCTOBER, 1748,—22ND GEORGE 2ND, VOL. 5, pp. 515 AND 518.

## CHAPTER X.

At this session an act was passed prescribing the method of appointing sheriffs, and for limiting their continuence in office, and directing their duties therein. Section 9, of this act provided as follows:

"9. *And be it further enacted*, That where any person or persons holding lands of his majesty, shall fail to pay and satisfy the quit-rents due for the same, or where any person or persons shall be indebted for public county or parish levies, and shall not discharge the same within the time limited by law for the payment thereof, it shall be lawful for the Sheriff or collector of such quit-rents or levies, or either of them, to distrain any of the slaves, goods or chattels found upon the lands and in possession of the person so indebted, or failing, notwithstanding such slaves, goods, or chattels shall be comprised in any deed of trust. And if the owner thereof shall not pay the quit-rents or levies due, within five days after such distress, such Sheriff or collector, shall and may lawfully sell, by public auction, the slaves, goods and chattels, distrained, or so much thereof as shall be sufficient to satisfy the said quit-rents or levies, and the charges of distress and sale. But he shall give notice of the time and place of sale at the church of the parish wherein the distress shall be, by setting up a notice thereat, before the service begins, at some convenient or usual place near such church, and by publishing the same in the church-yard, immediately after divine service on the next Sunday after the expiration of said five days, which said sale shall not be in less than three, nor more than six days, after notice so given, and shall be good and effectual in law, against all and every person and persons whatsoever, claiming or pretending to claim any right title, or interest, in, or to any or the said slaves, goods or chattels."

In 1775 the colony of Virginia, in concert with other colonies revolted against the authority of Great Britain, and at a convention of her people held in Richmond June 29, 1776, she declared, among other things, that the government of Virginia as formerly exercised under the crown of Great Britain was "TOTALLY DISSOLVED."

OCTOBER, 1777.—2ND OF THE COMMONWEALTH.

The first *general* law passed by the *General Assembly* (the Legislature) of Virginia providing for the levy and collection of taxes for the support of the State Government, after the Declaration of Independence was adopted by Congress, was passed at this session. It was entitled "*An act for raising a supply of money for publick exigencies.*"

Section VIII, this Act, provides for the collection of the tax levied under it, as follows:

"*And be it further enacted*, That the commissioners of the tax in each county or corporation shall, on or before the first day of August annually, deliver to the Sheriff of the county, or to the collector or collectors appointed as aforesaid, a full and perfect list, formed from the returns of the several assessors, of all the persons, in alphabetical order, who resides in the county, and are to pay any rate or tax pursuant to this act, with the amount of what each person is to pay, collecting together what the same person shall be assessed in different hundreds, and distinguishing in what hundred the person chargeable resides or hath effects, taking a receipt from the Sheriff or collector for the same, and thereupon such Sheriff or collector shall proceed to collect and receive the several taxes and rates according to such list, and to levy the same by distress and sale of the slaves, goods and chattels, of such person who shall fail to pay what he or she shall be so assessed on or before the first day of September in any year, the sale of which estate shall be made not less than five days after the distress, for ready money, and notice thereof shall be published at the parish church, or most convenient meeting house, and no security shall be taken, or writ of replevin sued out thereupon: but no Sheriff or collector shall seize any slave for such taxes where other sufficient distress shall be shown him, nor make any unreasonable distress, on pain of being liable to the action of the party grieved, wherein the plaintiff shall recover full cost, although the damages shall be under forty shillings."

NOVEMBER, 1781,—6TH OF THE COMMONWEALTH.

At this session an act was passed, entitled:

*An act for ascertaining certain taxes and duties, and for establishing a permanent revenue.*

Sections *two*, *four* and seventeen of this act provide as follows:

2. "*And be it further enacted*, That there shall be collected, paid and distrained for the tax of one pound for every hundred pounds. And so in proportion for a greater or lesser sum, of the valuation of all lands and lots, as the same shall be returned by the commissioners to the clerk of each county within this commonwealth; also a tax of ten shillings for every free male person above the age of twenty-one years, who shall become a citizen of this commonwealth, and also upon all slaves, to be paid by the owners thereof, except such free persons and slaves as shall be exempted on applications to the respective county courts through age or infirmity; also two shillings for every horse, mare, colt and mule; also three pence per head for all net cattle; also five shillings per wheel for

all coaches, chariots, phaetons, four wheeled chaises, stage wagons for riding carriages, chairs and two wheeled chaises; also fifty pounds for every billiard table and five pounds for every ordinary license, which tax shall be paid annually in the manner hereinafter provided."

"4. And the said sheriff shall, from and after the tenth day of June annually, collect and receive from all and every person and persons chargeable therewith, the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of July annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels which shall be found upon the lands, and in the possession of the person so indebted, or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes and charges of distress and sale, giving six days notice of the day and place of sale, by advertising the same at the church or other public places in the parish wherein such distress shall be, on the next Sunday arter the expiration of the said five days, which shall be good and effectual in law, against all persons whatsoever: *Provided*, That in all cases where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall give at least four weeks notice in the public papers before any sale shall be made of the same; and where other sufficient effects can be had thereon, distress shall not be made of such lands; *Provided always*, That where unreasonable seizures or distresses shall be made: the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages shall be given."

"17. *And be it further enacted*, That where any distress shall be made pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*."

This act, it will be observed, authorizes the distraint and sale of both real and personal estate for the payment of the taxes thereon. And this method of collecting taxes by the distraint and sale of real estate continued for several years thereafter, when the delinquent list was substituted for it.

OCTOBER 1782—7TH OF THE COMMONWEALTH.

VOL. XI. P. 112.

At this session an act was passed entitled as follows:

"*An act to amend and reduce the several acts of assembly for ascertaining certain taxes and duties, and for establishing a permanent revenue into one act.*"

The *second* section of this act provides for the levy and collection of additional taxes, as follows:

"*Be it enacted*, That from every owner of land or lots within this commonwealth, in addition to the tax already imposed, there shall be collected and distrained for, fifty per centum on the amount, or ten shillings on the pound of all sums payable for tax on lands and lots, as the same may be charged by the examiners appointed under the act of the present session of assembly, for equalizing the land tax." And section IV among other things provides for the collection of the taxes assessed, as follows: "And the said sheriff shall, from and after the first of May annually, collect and receive from all and every person and persons chargeable therewith the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of June annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same or so much thereof as shall be sufficient to discharge the said taxes and the charges of distress and sale, for ready money; but if the same will not sell, in the opinion of the officer making the distress, for three-fourths of their value, then the same shall be sold for one month's credit, giving six days notice of the day and place of sale, by advertising the same at the church, or other public places in the Parish wherein such distress shall be, on the next Sunday after the expiration of said five days, and shall take sufficient security residing in the county, for the payment thereof; and in case the same shall not be paid within the said one month, such officer is hereby authorized and required to make immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their securities, and proceed to sell the same for the best price that can be got in ready money; which several sales shall be good

and effectual in law against all persons whatsoever. *Provided, always*, that where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall sell the smallest number of acres that the lowest bidder will pay the taxes for, together with the charges of distress and sales which shall be laid off by the Surveyor of the county and conveyed by the sheriff. The proprietor of the land, his or her agent or attorney, may appoint, on the day of sale, what of the tract shall be sold; and in case of failure so to do the sheriff or collector shall sell that part as in his opinion will least injure or prejudice the tract; and where other sufficient effects can be had thereon, distress shall not be made of such lands. *Provided, always*, that where unreasonable seizurer or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages are given."

This is the last quotation from Henning's statutes at large.

My next quotations will be from the following Appendix to Vol. 2nd of the Revised Code of Virginia, of 1819.

## APPENDIX IV.

To Vol. 2nd, of the Code of Virginia of 1819, containing "*a series of laws concerning forfeitures and sales of lands for taxes.*"

I quote this series so far as relate to the distraint and sales of lands and other property for taxes, precisely as I find them in this Appendix.

And some of them are amendments to acts and parts of acts already referred to.

The first of the series is as follows:

### C. 1.

Passed November, A. D. 1781.

"Part of the fourth section and seventeenth section of an act entitled, '*an act for ascertaining certain taxes and duties and for establishing a permanent revenue.*'"

"4. And, for the collecting and accounting for the taxes imposed by this act, *Be it enacted*, That the court of every county within this Commonwealth, respectively, shall, in or before the month of *May*, annually, take bond of the sheriff, with sufficient security, in the penalty of ten thousand pounds, payable to the treasurer of this Commonwealth, for the time being, and his suc-

cessors, for the use of this Commonwealth, and conditioned for the true and faithful collecting, paying and accounting for, all taxes in his county hereby imposed; and the said bond shall be recorded in the court where the same is taken, and an attested copy thereof shall be transmitted by the respective clerks, without delay, to the auditors of public accounts, which shall be admitted as evidence in any suit or proceeding founded thereon. And the said sheriff shall, from and after the tenth day of *June* annually, collect and receive, from all and every person and persons chargeable therewith, the taxes imposed by this act in his said county; and, in case payment be not made or received on or before the first day of *July* annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands, and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and, if the owner thereof shall not pay the taxes due, within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes, and the charges of distress and sale, giving six days notice of the day and place of sale, by advertising the same at the church or other public place in the parish wherein such distress shall be, on the next Sunday after the expiration of the said five days, which sale shall be good and effectual in law, against all persons whatsoever: *Provided*, That in all cases where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall give at least four weeks notice in the public papers, before any sale shall be made of the same; and where other sufficient effects can be had therein, distress shall not be made of such lands: *Provided*, always, That where unreasonable seizures or distress shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs, where any damage shall be given."

"17. "*And be it further enacted*, That where any distress shall be made, pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value, in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*."

C. 2, p. 509.

"*The ninth section of the act, entitled*, '*An act to amend the act for ascertaining certain taxes and duties, and for establishing a permanent revenue.*'"

Passed May, 1782.

"9. *And be it further enacted*, That so much of said act, as de-

clared, that, when any distress shall be made, pursuant to this act, and the lands, goods or chattels will not sell for three-fourth of their value, in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*, shall be repealed: And in all such cases, as aforesaid, the officer making such distress, shall sell the lands, goods or chattles, so destrained, for one month's credit, and shall take sufficient security, residing in the county, for the payment thereof; and, in case the same shall not be paid within said one month, such officer is hereby authorized and required to make immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their security or securities, and proceed to sell the same for the best price that can be got in ready money."

C. 3 p. 510.

"*Part of the fourth section, and the twenty-fourth section, of the act, entitled, 'An act to amend and reduce the several acts of Assembly, for ascertaining taxes and duties, for establishing a permanent revenue, into one act.'*"*

[Passed October. 1782.]

"4. And the said sheriff shall, from and after the first day of *May*, annually, collect and receive, from all and every person and persons chargeable therewith, the taxes imposed by this act, in his said county; and, in case payment be not made or received, on or before the first day of *June* annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels shall be comprised in any deed or mortgage; and, if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes, and the charges of distress and sale, for ready money; but, if the same will not sell, in the opinion of the officer making such distress, for three-fourths of their value, then the same shall be sold for one month's credit, giving six days' notice of the day and place of sale, by advertising the same at the church, or other public places, in the parish wherein such distress shall be, on the next *Sunday* after the expiration of the said five days, and shall take sufficient security, residing in the county, for the payment thereof; and, in case the same shall not be paid within the said one month, such officer is hereby authorized and required to make

immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their security or securities, and proceed to sell the same for the best price that can be got, in ready money; which several sales shall be good and effectual in law, against all persons whatsoever: *Provided, always*, That, where any sheriff or collector shall make seizure of any lands, by virtue of this act, he shall sell the smallest number of acres that the lowest bidder will pay the taxes for, together with the charges of distress and sale, which shall be laid off by the surveyor of the county and conveyed by the sheriff. The proprietor of the land, his or her agent or attorney, may appoint, on the day of sale, what part of the tract shall be sold; and, in case of failure so to do, the sheriff or collector shall sell that part as, in his opinion, will least injure or prejudice the tract; and, where other sufficient effects can be had thereon, distress shall not be made of such lands: *Provided, always*, That, where unreasonable seizures or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages shall be given."

C. 5, p. 515.

*An act to remedy abuses in the manner of selling lands for the payment of public taxes.*

[Passed January 7, 1788 ]

1. "Whereas, the manner of selling land, as heretofore practiced by the various sheriffs and collectors, for the payment of the public taxes due thereon, has, in many instances, produced great oppression; for remedy whereof in future, *Be it enacted*, That all sales of land for the payment of taxes shall be on the premises: and any sale made thereof otherwise shall be void.

2. No sale shall be made of land for payment of taxes, if other property sufficient, belonging to the person chargeable with the land tax, can be found in the county.

3. Before any sale shall take place of any land for payment of taxes, notice thereof shall be given at least eight weeks in the Gazette of the public printer, and shall be advertised at the Court House of the county where the land lies, on the first day of two several courts previous to such sale; and proclamation shall also be made thereof at the door of the Court House, on the said days, between the hours of twelve and four.

4. All sales of land so made, shall be conducted by the high

sheriff, where the sheriff has entered into bond for the collection of the taxes. And, if any other person hath been or shall be appointed by the court to collect the taxes, the sales of land made to discharge the taxes shall be conducted by the said collector, and not by a deputy.

5. The said high sheriff or collector of taxes shall give to the commissioner of the land tax in his county at least thirty days notice, previous to any sale of land as aforesaid; and the said commissioner shall attend the said sale, for which he shall be allowed six shillings, to be paid by the person chargeable with such land tax; and if the land so offered for sale will not yield a price in the opinion of the said commissioner, equal to one-half of the value thereof, taking for his guide, in estimating the value, the price at which such land is charged, by the act equalizing the land tax, and having regard to the quality of the particular part of the land so offered for sale, then the said commissioner shall bid for and purchase the said land on account of the public, and shall give to the sheriff or collector a certificate thereof, expressing therein the amount of taxes for which such land hath been sold; which certificate, being by the said sheriff or collector paid to the treasurer, he shall have credit for the same, in part of the land tax; and the person who was chargeable originally with the said land tax, may discharge the same, and be entitled to all the estate he held to such land, in as full and ample a manner as if the said sale had never been made; *Provided*, Payment be made of the said taxes agreeably to the certificate of the commissioner, into the public treasury, at any time within six months after such certificate shall be delivered to the treasurer, together with twenty-five per centum damages on the amount thereof; or if payment be made at any time, not less than six months, nor more than two years thereafter, the same may be discharged by payment of double the amount of said certificate. But, provided payment shall not be made thereof within two years from the time that such certificate shall be paid to the treasurer, then, and in that case, the Governor shall appoint such person or persons, as may to him, with the advice of council, seem proper, to sell the said land and convey the same to the purchaser thereof, and pay the amount of the debt due to the public, with the damages and expenses of sale in the first instance from the money arising from the sale thereof, and to pay the surplus, if any, to the person who may have been the proprietor of the land, at the time the commissioner of the taxes may become the purchaser thereof, on public account, or to the legal representative or representatives of such proprietor."

C. 6, p. 517.

"*An act to amend the act entitled, 'An act to remedy abuses in the manner of selling lands for the payment of public taxes.'*"

[Passed December 27, 1790.]

1. *Be it Enacted by the General Assembly*, That so much of all and every act and acts as directs the sale of any lands for the payment of the tax thereon, shall be and the same is hereby repealed.

2. *And be it further enacted*, That each sheriff or collector of taxes within this commonwealth, shall at the time he returns a list of other insolvents, return a list of the lands within his county or corporation, where he can not find effects within the same belonging to the owner or tenant thereof, sufficient to satisfy and pay the tax. And if the court shall be satisfied of the truth thereof, they shall admit the sheriff or collector to make oath thereto, and direct the same to be certified to the auditor of public accounts, together with the names of the owners of each tract of land, and the place of his or her abode, where the court can obtain such information.

3. The auditor shall credit the same in account for the land tax with such sheriff or collector. And where it shall appear to the auditor from the certificates of the county courts, or where he shall be satisfied from other information, that any person so chargeable with any of the said taxes, resides, or hath any slaves or personal property in some other county of this Commonwealth, than that in which such land may lie, he shall certify the amount of the land tax with which such person is or shall be chargeable to the sheriff or collector of the county in which such person may reside, or have slaves or personal property, as the case may be, and shall debit such sheriff or collector with the amount of the taxes so transmitted to him, who may make distress for the same, and shall be accountable therefor, in like manner as for other taxes of his county.

4. A list of these insolvents, with the amount of the tax due from them respectively, shall be furnished by the clerk of the court to the collector of the tax for the succeeding year, and he shall also transmit a copy thereof to the auditor of public accounts, who shall debit the sheriff or collector therewith; and such sheriff or collector shall distrain and account for the same in like manner as for other taxes. And in case the said taxes cannot be collected the succeeding year, the like return upon oath shall be made, as is hereinbefore prescribed; and thereupon the treasurer shall cause to be inserted in the Virginia Gazette, for three weeks successively, the

names of such delinquents, with the quantity of land, the situation thereof, and the taxes due thereon.

5. *And be it further enacted*, That in case the tax on any tract of land within this commonwealth shall not be paid for the space of three years, the right to such land shall be lost, forfeited, and vested in the commonwealth; and it shall be lawful for any person to acquire title to any land so forfeited, in the manner prescribed for acquiring titles to waste and unappropriated lannds within this commonwealth, on the eastern waters, by an act, entitled, "An act to dispose of waste and unappropriated lands in the Commonwealth of Virginia, on the eastern waters."

C. 11, p 524.

*The twenty-ninth, thirty-fourth, and thirty-fifth sections of the act, entitled, "An act prescribing the mode of ascertaining the taxable property within the Commonwealth, and of collecting the public revenue."*

[Passed December 13, 1792.]

"29. It shall and may be lawful for all deputy sheriffs to collect and make distress for any taxes which may be due at the time of the death of their high sheriff, and shall be accountable for the same, in like manner as if the sheriff had lived, and no sheriff or collector shall be allowed to distrain for any taxes after two years from the time the taxes became due, except sheriffs appointed prior to the year one-thousand seven hundred and ninety-two, who shall have power of distraining for the taxes now due, for the term of eighteen months from the passing of this act: *Provided, nevertheless*, That no sheriff or collector shall be allowed to distrain for such arrearages, until he shall have entered into bond, with sufficient security, to be approved by such court, to pay and satisfy all such damages and costs as may be recovered against him, for any abuse of the power hereby vested in him."

"34. The sheriff or collector of taxes within this Common wealth, shall, at the time he returns a list of other insolvents, return a list of the lands within his county, or corporation, where he cannot find effects within the same, belonging to the owner or tenant thereof, sufficient to pay and satisfy the tax; and if the court shall be satisfied of the truth thereof, they shall admit the sheriff or collector to make oath thereto, and direct the same to be certified to the auditor of public accounts, together with the names of the owners of each tract of land, and the place of his abode, where the court can obtain such information. The auditor shall credit

the same in account for the land tax, with such sheriff or collector. And, where it shall appear to the auditor from the certificates of the county courts, or where he shall be satisfied from any other information, that any person so chargeable with any of the said taxes resides, or hath any slaves or personal property, in some other county of this Commonwealth, than that in which such land may lie, he shall certify the amount of the land tax, with which such person is or shall be chargeable, to the sheriff or collector of the county in which such person may reside or have slaves or personal property, (as the case may be) and shall debit such sheriff or collector with the amount of the taxes so transmitted to him, who may make distress for the same, and shall be accountable therefor, in like manner as for other taxes of his county. A list of these insolvents, with the amount of the tax due from them respectively, shall be furnished by the clerk of the court to the collector of the tax for the succeeding year, and he shall transmit a copy thereof to the auditor of public accounts, who shall debit the sheriff or collector therewith; and such sheriff or collector shall distrain and account for the same, in like manner as for other taxes; and, in case the said taxes cannot be collected the succeeding year, the like return upon oath shall be made, as is hereinbefore prescribed; and thereupon the treasurer shall cause to be inserted in the *Virginia* Gazette, for three weeks successively, the names of such delinquents, with the quantity of land, the situation thereof, and the taxes due thereon.

35. In case the tax on any tract of land within this Commonwealth, shall not be paid for the space of three years, the right to such lands shall be lost, forfeited and vested in the Commonwealth; and it shall be lawful for any person to acquire a title to any land so forfeited, in the manner prescribed by an act, entitled, *An act for reducing into one, the several acts concerning the land office; ascertaining the terms and manner of granting waste and unappropriated lands; for settling the titles and bounds of lands; directing the mode of processioning; and prescribing the duty of surveyors.*

C. 16, p. 530.

*An act to amend an act, entitled, "An act more effectively to provide for the payment of taxes upon lands within this Commonwealth."*

[Passed January 20, 1807.]

"1. *Be it enacted by the General Assembly,* That when taxes on any tract or parcel of land shall have heretofore remained, or shall

hereafter remain unpaid, for the space of two years, such tract or parcel of land shall be forfeited to the Commonwealth, and shall not be subject to location. *Provided, nevertheless*, That the tract or parcel of land, so as aforesaid forfeited, shall be subject to the redemption of the former rightful and proper owner, at any time within three years after such forfeiture shall have occurred, upon payment of the taxes due thereupon, according to the following rules, to wit: That if the said taxes shall be paid in the first year after such forfeiture shall have occurred, there shall be paid an interest of twenty-five per centum per annum, on the amount of the said taxes from the time they became due, till paid; if the said taxes shall be paid in the second year after such forfeiture shall have accrued, there shall be paid an interest of fifty per centum per annum on the amount of taxes due as aforesaid. If the said taxes shall be paid in the third year after such forfeiture shall have accrued, there shall be paid an interest of one hundred per centum per annum, as aforesaid; *Provided, also*, That nothing in this act shall be construed as to affect the rights of infants, femes covert, or persons of unsound mind, until one year after the disabilities shall have ceased, on their paying all taxes due, with an interest thereon, at the rate of ten per cent per annum on the amount due as aforesaid."

C. 17, p. 531.

"*An act providing for the redemption of certain lands forfeited by the non-payment of the taxes thereon.*

[Passed February 6, 1809.]

1. *Be it enacted by the General Assembly*, That all lands heretofore forfeited, or hereafter to be forfeited to the Commonwealth for the non-payment of taxes, by virtue of the laws now in force, shall be redeemable at any time within three years from the time when such forfeiture hath heretofore accrued, or shall hereafter accrue, and until the first day of March next succeeding the expiration of the said term of three years, on payment of the taxes due thereon, with an interest of ten per centum per annum, on each year's tax, from the time when the same became or shall become due, until the time of such redemption ; *Provided, nevertheless*, That all lands heretofore forfeited shall be redeemable in like manner, and on payment of the like interest, on or before the first day of March, in the year one thousand eight hundred and ten.

2. *Be it further enacted*, That the auditor of public accounts shall, on or before the first day of March, in the year one thous-

and eight hundred and eleven, and on or before the first day of March, in every year thereafter, deliver to the collector of the taxes of each county, a list of all such forfeited lands therein, as, on the first day of March preceding, had become irredeemable; which list shall be forthwith posted or hung up in the most public place in the court-house of the county.

3. *Be it further enacted*, That, on the first Monday in Augut, in the year one thousand eight hundred and eleven, and on the first Monday of August, in every year thereafter, the collectors shall proceed, by public auction, at the door of the court house of each county, to sell to the highest bidder, each tract of land contained within the list of such forfeited lands as were irredeemable on the first day of March, in the preceding year, for ready money.

4. *Be it further enacted*, That, if at any such sale, the former owner or owners of any forfeited tract of land, so about to be sold, or any person for him, her or them, or in his, her or their behalf, with or without any authority or direction for that purpose, shall appear and pay the taxes due thereon, with interest as aforesaid, until the time of such sale, such tract shall not be sold, but an entry of such payment shall be made by the collector on the list aforesaid, and a receipt for such payment given to the person making the same, in the name of the former owner or owners; and, thereupon such land shall be taken to be redeemed, and the forfeiture accrued thereon shall be, and the same is hereby fully waved and remitted.

5. *Be it further enacted*, That it shall be the duty of the commissioner or commissioners of the revenue, annually, on the first Monday of August, to attend at the court house of their respective counties, and to take and make a list of all the sales so to be made by the collector. Specifying the name or names of the former owner or owners, the sums paid, and to whom sold; which list the commissioner or commissioners shall forthwith transmit to the Auditor of Public Accounts, who shall charge the collector with the amount of sales appearing thereon."

The only other section of this act which I deem necessary and proper to be inserted here, is section—

"8. *Be it further enacted*, That it shall be the duty of every collector making a sale by virtue of this act to make and execute to the purchaser a deed in fee simple for the lands purchased, reciting the cause of the sale; and in every action or suit at law or in equity, in which a former owner or owners of any tract of land, so sold and conveyed, his, her, or their heir or devisee, or other person or persons claiming under him, her or them, shall contest the validity or the sale so made, the *onus probandi* shall be upon the party so contesting."

C. 18, p. 533.

*An act to compel persons who own lands in this Commonwealth to cause the same to be entered in the Book of the Commissioners of the Revenue, and for other purposes.*

[Passed February 5, 1810.]

1. Whereas, It is represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue thereupon; for remedy whereof, *be it enacted*, That if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioner's books of that county in which the land lies within eighteen months after the passage of this act, the same shall be forfeited to this Commonwealth: *Provided always*, That the rights of infants, femes covert and persons of insane memory shall not be affected by this law.

2. *And be it further enacted*, That the land so forfeited shall be sold, and the money to arise from such sale shall be paid into the public treasury there to remain at the disposition of the General Assembly.

3. *And be it further enacted*, That the high sheriff, the clerk of the supreme court of law, and the attorney for the Commonwealth in each county, or any two of them, shall be. and are hereby authorized as commissioners, to make sale of the lands so forfeited and execute deeds therefor.

4. *And be it further enacted*, That every person who shall make discovery and proof to the county court of lands forfeited by virtue of this act shall receive therefor ten per centum upon the amount of the sale of any such lands. And it shall be the duty of the said court, immediately upon such discovery and proof, in a summary way to make an order in the nature of a decree directing the aforesaid commissioners to sell said land to the highest bidder for ready money. *Provided, nevertheless*, That no sale shall be made by virtue of the act, unless the same shall have been advertised two months previous thereto at the door of the court house of that county wherein said lands shall lie. *And provided also*, That the said forfeited land shall be sold at public auction, on some court day, not more than four nor less than two months after the rendition of the decree aforesaid. *Provided also*, That no person shall receive said per centum for discovery and proof of forfeited lands, nor shall any proceedings be had relative to such proceedings by the court, until the first day of June, in the year one thousand eight hundred and twelve."

"13. *Be it further enacted*, That the deeds to be made in virtue the *eighth* section of the aforesaid act shall be made by the commissioners appointed by the act, or by any two of them, and not by the sheriff only."

C. 24, p. 542.

*An act to amend and explain the act, entitled, "An act concerning taxes on lands."*

[Passed February 9, 1814.]

"1. *Be it enacted by the General Assembly*, that the commissioners of the revenue shall annually make out their books containing a list of the land tax within their respective districts, and that said books shall be in the form following:

List of the land tax within the district of A. B. commissioner in the county of C. for the year.

| Name of owner. | Residence. | Estate. | Number of town lots. | Name of the town. | Yearly rent of lots. |
|---|---|---|---|---|---|
| Amount of taxes upon lots at——in——— | Number of acres of land. | Description of the land. | Distance and bearing from the court house. | Rate of land per acre. | Total value of land. |
| Amount of tax upon land at——per—— | Total of tax on lots and land. | Explanation of alterations during the preceding year. | | | |

The said commissioners shall enter each tract of land and town lot separately in their said books; and, according to the best information which they can obtain, shall particularly describe the same in the manner following: in the first column they shall enter the name of the person, who, by himself, or his tenant, has the freehold in possession; in the second, the place of his residence; in the third his estate, that is, whether for life, or in fee; in the fourth, the number of lots in any town; in the fifth, the name of the town in which they are situated; in the sixth, the yearly rent of the lots; in the seventh, the amount of tax upon the lots at the rate of taxation ascertained by law; in the eighth the number of acres of land; in the ninth, the description of the land as to the water courses, mountains, or other notorious places, on which or near to which it lies, other lands which it adjoins, and the number of the tract, if any; in the tenth, its distance and general bearing from the court house of the county; in the eleventh, the rate of the land

per acre; in the twelfth, the total value of the land; in the thirteenth the amount of the tax on the whole tract at the rate of taxation prescribed by law; in the fourteenth, the total amount of taxes on lots and lands; in the fifteenth, all alterations made since the preceding year shall be particularly noted and explained, showing distinctly for what reason and upon what authority each alteration has been made.

17. In any case where a tract of land, charged with taxes in one county, lies partly in that county and partly in another, it shall be lawful for the sheriff of the county in which the land is so charged to distrain on that part of the land lying in the other county, in the same manner as if such part was actually in his own county.

18. The sheriff, whenever he shall return any land delinquent, for the non-payment of the taxes due thereon, shall distinctly set forth, that he could find no property within his bailiwick belonging to the person charged with such taxes; and that, after diligent enquiry, he could either not find any property on the land liable to distress, or could not ascertain the land so charged.

19. The form of his return shall be as follows:

List of delinquencies in the land tax, in the county of ———, for the year.

| Name of Person. | Residence. | Estate Held. | Quantity of Land. |
|---|---|---|---|
| Description and local situation of land. | Distance and bearing from court house. | Amount of tax | Why returned delinquent. |

20. At the foot of such return, he shall take and subscribe the following oath or affirmation, such oath or affirmation to be taken before any justice of the peace, and certified by him:

I, A. B., sheriff, (or deputy sheriff, as the case may be,) do solemnly swear (or affirm) that the foregoing list of delinquencies in the land tax in the county of ———, for the year —— is, as I do verily believe, correct and just; that I have received no part of the taxes therein returned delinquent; and that I have made diligent enquiry, for the purpose of finding property within my bailiwick, liable to distress for the said taxes, but have found none.

A. B., sheriff of —— county,
(or D. S. for ———, sheriff of ——— county.)

24. The sheriff shall add to the principal sum of arrearages on each tract, ten per centum, as damages for the want of punctuality in the payment; and for the collection of these arrearages and damages, he shall have the same power of distraining and selling

personal property, as for the collection of other taxes on land. He shall, moreover, at the May, June and July term of the county court of his county, advertise a sale of the delinquent lands, at the door of the court house, in the following form:

Notice is hereby given that at the next August court of ——— county, at the court house thereof, I shall sell at public auction, for cash, so much of all the lands and lots in that county, returned delinquent for the non-payment of the taxes of the last year, as will be sufficient to discharge the arrears of taxes which shall then remain unpaid, for that year, and ten per centum damages thereon, together with the taxes of the present year. The sales will commence on the first day of the court, and continue from day to day, until they shall be completed.

The subscriber is authorized to receive all such taxes and damages at any time before the land shall be sold. A list of delinquencies may be seen in the clerk's office of the county, in possession of the subscriber, or in the office of the auditor of public accounts.

A. B.. sheriff of ——— county,
or A. B., deputy for ———, sheriff of ——— county,
—— day of —— —

25. A copy of this advertisement shall also be published, at least once in every week for two months preceding the time of sale, in some newspaper printed in the city of Richmond.

26. The sheriff shall annex, to his advertisement at the door of the court house, a copy of his list of delinquencies; and, for his trouble and expenses in setting up and publishing the advertisement aforesaid, he shall be allowed the sum of three dollars, to be paid out of the public treasury; and shall also be allowed the expense of publishing such advertisement.

27. In pursuance of said advertisement, the sheriff shall accordingly sell so much only of each tract of land and lot within his county, returned delinquent for the preceding year, as will be sufficient to discharge the arrears of taxes for the year which then remains unpaid, with ten per centum damages thereon, and the taxes due for the year in which the sale shall take place.

28. The sheriff, on behalf of the Commonwealth, shall execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth, particularly and truly, the amount of the purchase money; but the deed shall contain no warrenty, nor shall the Commonwealth be in any manner answerable for the title, or liable to refund the purchase money for any defect of title, or irregularity, or error of any kind in the proceedings. For execut-

ing the deed, the sheriff shall be allowed one dollar, to be paid by the purchaser.

30. If no person shall agree to give for any tract of land or lot so exposed to sale, the amount of taxes and damages for which it is hereby directed to be sold, the title to such tract of land or lot, shall be thereupon vested in the president and directors of the literary fund in the same manner as if they had been purchasers thereof at the sale, and as if the sheriff had executed to them a deed therefor; and the taxes due thereon shall be extinguished. Such lands or lots, while they remain the property of the literary fund shall not be chargeable with tax.

This is the last act to which I desire to call attention, in Appendix IV.

The next statute to which I call attention is found volume 2nd of the Revised Code of Virginia, of 1819, page 15. This act is entitled:

"*An act reducing into one, the several acts, prescribing the mode of ascertaining the taxable property within this Commonwealth, and of collecting the public revenue.*"

[Passed March 6, 1819.]

Sections *sixty-two*, *sixty-five*, *sixty-six*, and *sixty-eight*, of this act provide for the collection of the taxes assessed under the provisions of this act, and are all of it that I deem necessary to insert here. They are as follows:

"62. It shall be the duty of every sheriff and collector within this Commonwealth to proceed to collect all taxes imposed by law on lands, slaves and other property, agreeably the lists taken and returned by commissioners of the revenue, cummencing on the first day of *June*, and they may be distrained for on the first day of *July* next succeeding. And the sheriffs and collectors shall, on or before the first day of *November*, in each year, pay into the treasury all taxes to be by them collected in each and every year; allowing, however, to every sheriff or collector, whose county court house is more than one hundred and fifty miles from the seat of governmen, one day after the said first day of *November*, for every thirty miles of such excess."

"65. In case payment be not made by any person, chargeable with any tax, levy, fine or forfeiture or amercement, the sheriff or collector shall have power to distrain the slaves, (if other sufficient distress can not be had,) goods or chattels which shall be found upon the lands, notwithstanding such slaves, goods or other chat-

tels shall be comprised in any deed or mortgage; but he shall make or take no unreasonable seizures or distresses, upon penalty of being liable to the action of the grieved, grounded upon this act, in which action the plaintiff shall recover his full costs, although the damage given may not exceed seven dollars. Nor shall he sell any other right or title in any slave, goods or chattels so distrained, than the person charged with such tax hath therein.

66. And, in the collection of taxes due upon lands, the sheriff shall be authorized to distrain any personal properly in his bailiwick, belonging to the person to whom such taxes are charged, or any personal estate on the land in possession of such person, his tenant, or any other claiming title by, through or under him; *Provided*, That the property of any person in possession of any part of a tract of land or lot, the whole of which stands charged to another, having a free-hold title of record to that part, derived by, through or under that other, shall not be liable to distress for any taxes, on the residue of the land, having accrued subsequent to the date of such record; *And provided also*, That the sale of any personal property distrained upon the land, for taxes due thereon, shall convey only such title as the owner or occupier of such land held in such personal property."

"68. If the owner of the property so taken shall not pay such tax, levy, fine, forfeiture, or amercement, within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as may be sufficient to discharge the said taxes, and the charges of distress and sale.

On April 1st, 1831, an act was passed by the General Assembly of Virginia, entitled as follows:

"*An act concerning lands returned delinquent for non-payment of taxes, and making disposition of certain lands so delinquent, and of certain escheated lands, for the benefit of bona fide holders thereof under grants from the Commonwealth.*"

This act, while not providing for the collection of taxes, is a very important one in its bearing upon the power of the legislature for forfeiting lands. So far as I deem it necessary to quote it, this act is as follows:

"1. *Be it enacted by the General Assembly*, That all lands except such as shall be hereinafter excepted, which having been returned delinquent for the non-payment of taxes therein, were vested in the president and directors of the literary fund, by the act passed the ninth day of February, one thousand eight hundred and fourteen, entitled, 'an act concerning taxes on lands,' and which shall

not have been redeemed before the first day of January last past, in pursuance of former laws allowing such redemption, and prescribing the manner, terms and times thereof, shall forever hereafter be irredeemable.

2. And all lands, except such as shall be hereinafter excepted, returned delinquent for the non-payment of taxes thereon for the year one thousand eight hundred and twenty, or for any year or years previous thereto, and which shall not have been heretofore redeemed, or otherwise exonerated from arrears of taxes due thereon, in pursuance of former laws, allowing such redemption or exoneration, and prescribing the manner, terms and times thereof, or shall not be redeemed before the first day of January next, in pursuance of the provisions of this section hereinafter contained; and all lands, except such as shall be hereinafter excepted, which, after having been sold for arrears of taxes due thereon, have been redeemed by the executive, in pursuance of the act passed the twentieth day of February, one thousand eight hundred and seventeen, entitled, "an act to amend the several acts concerning arrearages of taxes on lands, houses and lots," and which shall not have been heretofore redeemed, by or for the original proprietors, by payment into the treasury of the monies paid by the executive for the redemption thereof, with the damages thereon according to law, or shall not be redeemed before the first day of January next, in pursuance of the provisions in this section hereinafter contained, shall be, and the same are hereby declared to be, from and after the said first day of January next, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons, in whose name or names the same were returned delinquent for non payment of taxes thereon, and of all and every person or persons, in whose name or names the same were returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them, shall be thenceforth, and the same are hereby absolutely vested in the president and directors of the literary fund. And further time until the said first day of January next, is hereby allowed for the redemption of all such lands in this section above mentioned, by payment into the treasury of all arrears of taxes due thereon, or of the money so advanced by the executive for the redemption thereof, as the case may be, together with damages on such arrears, or on the monies advanced by the executive, as the case may be, according to the provisions of the former laws concerning the same, respectively.

3. And all lands, except such as shall be hereinafter excepted for any year or years subsequent to the year one thousand eight

hundred and twenty, and previous to the passing of this act, and which have not been heretofore redeemed, or otherwise exonerated from arrears of taxes due thereon, in pursuance of former laws allowing such redemption and exoneration, and prescribing the manner, terms and times thereof, and upon which all the arrears of taxes that have heretofore accrued, with ten *per centum per annum* damages thereon, shall not be paid into the treasury, upon warrant of the auditor of public accounts, before the first day of November, which shall be in the year one thousand eight hundred and thirty-three, shall be, from and after the last mentioned date, and are hereby, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons in whose name or names the same are or were returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them, being so forfeited, shall be, from and after the last mentioned date, and are hereby, vested absolutely in the president and directors of the literary fund.

4. And in case any lands, except such as shall be herein-after excepted, shall hereafter be returned delinquent for non-payment of taxes thereon, and the person or persons in whose name or names the same shall be so returned, or some other person for him or them, shall fail for three years, to be computed from the last day of December of the year for which such taxes shall accrue and be in arrear, to pay into the treasury, upon warrant of the auditor, the amount of taxes justly due thereon and in arrears, with *ten per centum per annum* damages thereon, from the date when the same accrued; all such lands so returned and remaining delinquent for non-payment of taxes, shall be, from and after the expiration of the said term of three years, and the same are hereby declared to be forfeitted, and shall be thenceforth forever irredeemable: and all such lands, and all right, title and interest in or to the same, of all and every person or persons, in whose name or names the same shall be returned delinquent for non-payment of taxes due thereon, and of all and every person or persons claiming under them, being so forfeited, shall be, from and after the expiration of the said term of three years, and the same are hereby vested absolutely in the president and directors of the literary fund: *Provided*, That in all cases of lands returned delinquent and forfeited for non-payment of taxes, and heretofore vested by law in the president and directors of the literary fund, as well as of lands which have been or shall be returned delinquent for non-payment of taxes, and which shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said presi-

dent and directors, as were, or shall be vested in the person or persons in whose name or names such lands have been, or shall be, returned delinquent, and in the heirs, devisees or purchasers claiming under such person or persons, at the time such lands were heretofore, or by force of the provisions of this act, shall be forfeited and vested in said president and directors: *And provided*, That in all cases of lands, which having been returned delinquent for non-pnyment of taxes, have been heretofore vested by law in the president and directors of the literary fund; and of lands, which having been returned delinquent for non-payment of taxes heretofore accrued, shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said president and direc tors; and of lands which shall hereafter be returned delinquent for non-payment of taxes hereafter to accrue, and which shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said president and directors; if the person or persons, in whose name or names such lands have been heretofore returned delinquent, and vested in the said president and directors, were, at the date of such furfeiture declared, and still remain, under disability of infancy, coverture, insane mind or imprisonment; and if the person or persons, in whose name or names such lands, as shall be, according to the provisions of this act, forfeited and vested in the said president and directors, and have been returned delinquent, are now under any of the said disabilities; and if the person or persons, in whose name or names, such lands, as according to the provisions of this act shall or may be hereafter forfeited and vested in the said president and directors, shall be returned delinquent, shall be, at the date of such forfeiture, under any of the said disabilities: in such case, it shall and may be lawful for such person or persons, to redeem such lands, by payment into the treasury, upon the warrant of the auditor, of all arrears of taxes justly due and chareable thereon, with *ten per centum per annum* damages on the same, from the time or times when the taxes accrued or shall accrue, within two years next after their respective disabilities removed, and not afterwards; and if such person or persons shall die in any such state of disability, then the heirs or devises of such person or persons so dying, may, in like manner, and in like terms, redeem such lands within two years after the death of his, her or their ancestors or devisors. *And provided*, That nothing in this act contained shall be construed to annul, impair or in any wise affect the rights of any purchaser or purchasers of any lands heretofore forfeited for non payment of taxes, sold in pursuance of any former law; but all such rights shall continue to be

regulated and determined by the former laws relating to them, as if this act had never been passed."

The next act to which I wish to call attention is that passed March 10th, 1832, entitled,

*An act concerning delinquent and forfeited lands, and provide for the sale of lands returned delinquent hereafter for the non-payment of taxes.*

Section *eleven* to *fifteen*, inclusive, of this act provide as follows:

"11. The sheriff or collector of the revenue tax shall, at the August or September term of his county or corporation court, return to the said court a list of all lands and lots (other than those not ascertained as aforesaid, or are improperly placed thereon) within his county or corporation, which are delinquent for the non-payment of the taxes due thereon; and shall distinctly set forth, that he could find no property in his bailiwick belonging to the person charged with such taxes; and that, after diligent enquiry, he could not find property on the said land or lot liable to distress, sufficient to satisfy the taxes due thereon; which list shall be in the following form:

*List of lands and lots within the county of , delinquent for the non-payment of the taxes due thereon for the year ,*

| Name of person | Residence. | Estate held. | Quantity of land. | Description and local situation of land. | Distance and bearing from Court house | Amount of taxes. | |
|---|---|---|---|---|---|---|---|
| | | | | | | Dollars | Cents. |
| | | | | | | | |

At the foot of the return made in manner aforesaid, the sheriff or collector shall, in open court, make and subscribe the following oath or affirmation: "I, A. B., sheriff (or deputy sheriff as the case may be) do solemnly swear (or affirm) that she lands and lots contained in the above list, are delinquent for the non-payment of taxes due thereon for the year ; that I have received no part of the taxes therein returned delinquent, and that I have made diligent enquiry for the purpose of finding property within my bailiwick liable to distress for the said taxes, but have found none. So help me God.

A. B., sheriff of county,

Or C. D., deputy sheriff for A. B., sheriff of county."

The court of the said county or corporation sha'l examine the

said list, and being satisfied that it contains the truth, shall direct their clerk to certify the same to the auditor of public accounts, and to preserve the original in his office; and the said clerk shall make out a fair copy of said list and verification, which he shall deliver to the sheriff or collector who returned the same. The said sheriff or collector shall make out three fair copies of said list and verification, and shall, within ten days after making said return, set up at the courthouse door of his county or corporation, one copy of said return; and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county or corporation, and shall subjoin to each return a notification, that unless the taxes charged upon the lands and lots in the said list mentioned, shall be paid on or before the day of sale, that the said lands and lots, or so much thereof as shall be sufficient to satisfy the taxes due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same, will, on the first day of the next September or October court, at the courthouse of the said county or corporation, be sold at public sale.

12. The said sheriff or collector shall, pursuant to his notification, proceed on the first day of the aforesaid September or October term of his county or corporation court, before the front door of the said court-house, to offer for sale each and every tract of land and lot in the said list mentioned, and by him advertised for sale, on which the taxes due thereon had not been paid, or so much of each and every tract of land and lot separately, as will satisfy the taxes due thereon, and the commission as aforesaid to the sheriff or collector. And the said sheriff or collector, not having time to complete the sale of the said lands and lots may countinue his sale from day to day, for five days, without the intermission of a day, (Sundays excepted,) until such sales shall be completed.

13. The sale of the said lands shall be of each entire tract, separately, or of such quantity or part thereof as shall be sufficient to discharge the taxes charged thereon, with five per cent. to the sheriff or collector. When less than the entire tract of land shall be sold, the quantity sold shall be laid off in the manner hereinafter provided, at the expense of the purchaser, his heirs or devisees. And in the sale of lots, the sale shall be of each entire lot, or of such undivided interest therein, to be held by the purchaser, his heirs or devisees, as tenants in common, as shall be sufficient to discharge the taxes charged thereon, with five per cent. to the sheriff or collector.

14. Any lands or lots being offered for sale, for the non-payment of the taxes charged thereon in the manner aforesaid, and no per-

son present bidding for the said lands or lots the amount of the taxes charged thereon, the sheriff or collector shall purchase in the same, in behalf the Commonwealth, for the amount of the taxes charged thereon, and they shall be vested in the Commonwealth for the use and benefit of the literary fund, in the same manner as if conveyed by deed.

15. The sheriff or collector, on receiving from the purchaser the amount of the purchase money, shall grant to the purchaser a receipt for the same, after the following form:

*List of land sold for the non-payment of the taxes charged thereon, in the county of——, for the —— year ——, this -- day of ——, eighteen hundred and ——*

| Name of the person charged with the taxes. | Quantity of land charged. | Local description of land. | Amount of taxes due. | Name of purchaser. | Quantity purchased | Amount of purchase money. |
|---|---|---|---|---|---|---|
| | | | | | | |

Received of the above sum of , it being the amount of purchase money for the above land, sold for the non-payment of taxes due thereon for the year , pursuant to an act of assembly in that case made and provided.

A. B., sheriff of county,

Or C. D., deputy sheriff for A. B., sheriff of county.

(Necessary affidavit attached.)

And now I come to one of the most important acts of all the series, passed February 27, 1835, entitled,

"*An act further to extend the time of redemption of lands and lots returned delinquent for the non payment of taxes west of the Alleghany mountains, and for other purposes.*

1. *Be it enacted by the General Assembly*, That further time shall be allowed until the first day of July, eighteen hundred and thirty-six, for the redemption of all lands and lots heretofore returned as delinquent for the non-payment of taxes, west of the Alleghany mountains, and which became vested on the first of October last in the president and directors of the literary fund, and the said redemption may be effected by payment into the publiic treasury of the taxes in arrrears and other legal charges, on the warrant of the first Auditor, in the same manner as if no forfeiture had occurred: *Provided, nevertheless*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant claiming under a junior

grant, whose rights are protected and secured under the provisions of the several acts which have heretofore passed upon the same subject, and are now in full force.

And whereas it is known to the general assembly, that many large tracts of lands lying west of the Allleghany mountains which were granted by the commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

2. *Be it therefore further enacted*, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty-six, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the commonwealth, after the fist day of July, eighteen hundred and thirty-six, except only as hereinafter excepted.

3. *Be it further enacted*, That all right, title and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable *bona fide* claimed, held or derived, from or under any grant of the commonwealth bearing date previous to the first day of April, eighteen hundred and thirty-one, who shall have discharged all

taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable; *Provided*, That nothing in this section contained, shall be so construed as to impair the right or title of any person or persons who have obtained grants from the commonwealth for the same land and have regularly paid the taxes thereon, but in all such cases, the parties shall be left to the strength of their origidal titles."

"5. *Be it further enacted*, That so much of the act entitled 'An act concerning delinquent and forfeited lands, and providing for the sale of lands returned delinquent hereafter for the non-payment of taxes,' passed March tenth, eighteen hundred and thirty-two, as authorizes and requires lands and lots returned delinquent for the non-payment of the taxes due thereon, to be annually sold, be and the same is hereby repealed.

"6. The sheriff or collector of the revenue shall, in each year, at the September or October court of his county or corporation, return to the court a list of lands and lots within his county or corporation, which are delinquent for the non-payment of the taxes due therein, in the form and manner required by the eleventh section of the above recited act; which list it shall be the duty of the court to examine, and if satisfied of its truth, to direct the original to be preserved by the clerk in his office, and a copy thereof to be certified by him to the auditor of public accounts, who shall place the same to the credit of the sheriff or collector of the revenue.

"7. It shall be the duty of the auditor of public accounts to keep a fair record of all lands and lots returned delinquent for the non-payment of the taxes, and in the months of April, May or June, of the year 1840, and in the same months in every five years thereafter, to cause a list of the lands and lots so returned delinquent for each county and corporation (the taxes on which shall not have been paid as hereinafter directed), to be delivered to the sheriff or collector of the revenue for the counties and corporations respectively, with a statement of the taxes due on each tract or lot of land, with six per centum damages thereon, for each and every year the said taxes, or any portion thereof, may have been due and unpaid, and to charge the amount of taxes and damages due on such list to the sheriff or collector of the revenue, to whom the same may be delivered. The sheriff or collector of the revenue within twenty days after receiving such list, shall make out three fair copies thereof, and set up one copy at the front door of the

court house, and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county or corporation, subjoining to each copy a notification that unless the taxes and damages charged upon the lands and lots in said list mentioned, shall be paid on or before the day of sale, the said lands and lots, or so much thereof as shall be sufficient to pay and satisfy the taxes and damages due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same, will, on the first day of the next succeeding September or October court, between the hours of ten in the morning and four in the evening, at the door of the court house of said county or corporation, be sold at public auction.

"8. The said sheriff or collector shall, pursuant to his notification, proceed to make sale of all lands and lots within his county or corporation, so as aforesaid returned delinquent for the non-payment of taxes, the taxes and damages on which shall not have been paid before the day of sale, and shall be governed in all his proceedings in making such sale, by the direction and provisions of the afore recited act, entitled, 'act concerning delinquent and forfeited lands, and providing for the sale of lands returned delinquent hereafter for the non-payment of taxes.' And if the sales be not finished on the day appointed in the advertisement, they shall be adjourned from day to day, during the sitting of the court, and if not then finished, be adjourned till the first day of the next court, and then proceeded in between the hours and at the place above prescribed; and if such adjournment to the next court be made, notice shall be given by advertisement at the door of the court house.

"9. The taxes and damages due upon any lands and lots returned delinquent for the non-payment of taxes, shall be and remain a lien upon said lands and lots, until the same shall be fully paid and satisfied. It shall and may be lawful for any person or persons having or claiming title to any lands or lots so returned delinquent, to pay the amount of taxes and damages due thereon into the treasury, on the warrant of the auditor of public accounts, at any time before the same shall be sold for the payment of the said taxes and damages.

"10. *Be it further enacted*, That all lands and lots which may have been sold under the afore recited act, and purchased by the sheriff or collector, in behalf of the Commonwealth, shall be embraced in the lists required to be made out by the auditor in the year eighteen hundred and forty, and shall again be offered for sale by the sheriff or collector in that year with other delinquent lands; and until the

day of sale, all such lans so purchased in behalf of the Commonwealth, shall be redeemable on warrant from the auditor, by payment of the taxes and damages into the public treasury.

11. When the sheriff or collector shall have completed his sales in the manner and at the periods prescribed by law, he shall render to the court of his county or corporation, a fair and distinct statement of his proceedings; in which statement shall be set forth the particular tracts or lots of land sold, and the amount of the purchase money, as well as such tracts or lots as shall have been offered for sale and not sold for want of bidders; and the court being sati-fied of the truth of said statement, shall certify the same to the audstor of public accounts. The sheriff or collector shall account for the net proceeds of the sales, at the same period and under the same penalties prescribed in relation to the public revenue."

MARCH 23, 1836, the following act was passed, entitled,

"*An act concerning delinquent and forfeited land not heretofore entered on the commissioner's books.*

(Acts of 1835–6, ch. 3.)

"Whereas, The time allowed by the second section of the act passed on the twenty-seventh of February, eighteen hundred and thirty-five, entitled, 'An act further to extend the time of redemption of lands and lots returned delinquent for the nonpayment of the taxes west of the Allegheny mountains, and for other purposes,' for the owners of omitted lands to cause the same to be entered on the commissioner's books, and to pay the taxes in arrear thereon, is not sufficient.

"*Be it therefore enacted*: That further time, until the first day of November, eighteen hundred and thirty-six, shall be allowed to all persons to cause sheir omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the above recited act, which passed on the twenty-seventh of February, eighteen hundred and thirty-five; and the said section shall not be construed to extend to any lands or lots which may have been omitted since eighteen hundred and thirty-one.

2. In all cases where lands have been heretofore omitted, the commissioner shall ascertain the value thereof, according to the best of his judgment, by reference to the assessed value of contiguous lands similarly situated, and shall charge the tax last imposed

by the legislature for as many years as the same shall have been omitted, together with ten *per centum* damages upon each year's tax; and this rule shall apply to the eastern as well as the western section of the state."

MARCH 30, 1837, an act was possed, entitled,

"*An act to amend and explain the laws concerning western land titles and for other purposes.*

(Acts of 1836–7, ch. 8, p. 9.)

"1. *Be it enacted by the General Assembly*, That all persons whose lands have been forfeited to the Literary Fund, either for the non-payment of the taxes charged thereon, or for the failure to enter them on the books of the commissioner of the revenue, may redeem their said lands at any time before the fifteenth of January next, by paying into the treasury of the Commonwealth the amount of taxes charged therereon, with damages at the rate of ten *per centum per annum* from the time they became due; or in the case of forfeiture to enter any lands with the commissioner of the revenue, the owner may redeem them by causing such lands to be entered with the commissioner of the revenue or the sheriff of the county, in which such lands are situate, and having the same charged with all arrearages of taxes chargeable thereon, and by paying such arrearages and damages thereon at the rate of ten *per centum per annum*, into the treasury of the Commonwealth before the fifteenth day of January next: *Provided*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant claiming under a prior grant, whose rights are protected and secured under the provisions of the several acts which have heretofore passed upon the same subject, and are now in full force."

"2. *Be it further enacted*, That all lands now forfeited and vested in the president and directors of the literary fund, by virtue of the several acts of the general assembly, concerning delinquent and escheated lands, which shall not be redeemed in the manner prescribed in the first section of this act, shall be sold on the first day of August county courts in eighteen hundred and thirty-eight, for the benefit of the literary fund, in the manner hereinafter directed.

"3. *Be it further enacted*, That it shall be the duty of the circuit superior court for each county situate west of the Blue Ridge mountains, at the next fall term thereof, to appoint a commissioner or commissioners, to be styled the commissioner of delinquent and forfeited lands, whose duty it shall be to ascertain and

report to the next term of said courts, the quantity of delinquent and forfeited lands in his county, designating particularly the number of tracts, and quantity contained in each tract, and also the local situation and probable value of each tract, together with all information which he may be able to procure in relation to the state of the title to said lands.

"4. *Be it further enacted*, That upon the return of said commissioner it shall be the duty of said circuit superior courts of law, by orders entered of record, to direct said commissioner to make sale of the said lands in the same manner, in all respects, as in the case of other lands directed to be sold under decree of said courts: *Provided*, That no such sale shall be made elsewhere than at the court-house of the county in which the land directed to be sold is situated, nor unless public notice of the time and place of sale shall have been published in some newspaper nearest the place of sale, and posted at the door of said court-house, and at least four of the most public places in said county, for thirty days next preceding said sale. The said courts are also hereby empowered and authorized, in all cases to direct such surveys and divisions of said lands as may be deemed necessary and expedient to promote the advantageous sales of said lands, the expenses of which surveys shall be reported to the courts aforesaid, and be paid out of the proceeds of the sales of such lands. But in no case shall the commonwealth be subjected to any expense by reason of said surveys beyond the proceeds of the sale of said lands, and no survey of any such lands shall be executed unless the surveyor will consent to receive his compensation for his services in making such surveys entirely out of the proceeds of said lands.

"5. *Be it further enacted*, That all sales made by virtue of this act shall be made by the commissioner appointed as aforesaid, under the orders of the circuit superior courts of this Commonwealth, in the manner and on the terms herein mentioned. He shall require one fourth of the purchase money in hand, and require bond with good security for the payment of the residue thereof, in twelve months from the date of sale, and he shall, moreover, reserve the title to the said lands by way of further security for the payment of the deferred installment. The said commissioner shall return a report of the sales made by him to the auditor of public accounts, and also to the court from which he received his appointment, designating particularly the local situation of each tract, the name of the purchaser, and the price at which it was sold, and also the costs of sale; and the bonds taken for the deferred installments of the purchase money shall be re-

turned by the commissioner to the court by which he may have been appointed, and shall have the force of judgments, and in case of the failure of the obligors to pay the amount thereof when they shall become due, it shall be the duty of the attorney for the commonwealth to move (having first given the obligors ten days notice of said motion) for an award of execution on said bonds, for which service he shall be allowed the same fees as in other motions of like kind, which shall, together with the other necessary costs and commissions attending the collection of said bonds, be taxed and included in said executions. The said commissioner shall also pay into his court all moneys collected or received by him by virtue of any such sales, and the said court shall then make an order allowing him such commissions and other reasonable expenses attending the survey and sale of said lands, as in its judgment may seem proper, and direct the residue thereof to be paid into the treasury of the Commonwealth for the benefit of the Literary Fund."

"8. *Be it further enacted*, That whenever any purchaser of any lands at any sale made under the provisions of this act shall have paid the whole amount of purchase-money by him stipulated to be paid therefor, it shall be the duty of the court by whose order the said sale was made to direct the said commissioner to convey to the said purchaser, by deed without warranty, all the interest of the Commonwealth in said lands."

MARCH 15, 1838.

On this day the General Assembly of Virginia passed an act as follows:

"*An act to amend an act, entitled, 'An act to amend and explain the laws concerning western land titles, and for other purposes.*"

"1. *Be it enacted by the General Assembly*, That all persons whose lands have been forfeited for the non-payment of the taxes thereon, or for the failure to enter them on the books of the commissioners of the revenue, shall have a further time, until the first day of July next, to redeem the same, by paying into the treasury of the Commonwealth, or to the sheriff of the county where they lie, as hereinafter provided, the amount of taxes charged, and damages thereon, at the rate of six *per centum per annum;* and in case of forfeiture for failure to enter as aforesaid, by causing such lands to be entered on the books of the commissioners as aforesaid, and having the same charged with all arrearages of taxes chargeable thereon, at the rate of six *per centum per annum*, into the treasury, or to the sheriff aforesaid; *Provided*, That such redemption

shall in no wise affect the claim or title of any *bona fide* occupant whose rights are protected and secured by any pre-existing law."

The extension of the time for the redemption of these forfeited lands to July 1st, 1838, by the first section of this act, was the last date at which any lands previously forfeited could be redeemed.

"Section 6. The judges of the several circuit superior courts to which such reports are returned, shall have power at any time after the first day of the next fall terms, either in term or vacation, to order sales of the lands reported from time to time as the reports are returned, and designate the term of the county court at which the same shall be made, by an order entered of record as aforesaid, when in term time, and by an indorsement on the report when made in vacation; and the said judges shall also have power in term time or vacation to recommit said reports, or set them aside, and direct others by order on record as aforesaid when in term, and by endorsement as aforesaid when in vacation. And if the sales shall not be made as ordered, the said judges shall have power to make other like orders, and so on, from time to time until the sales are completed; and they shall, moreover, have power to remove the commissioners for just cause, and to supply any vacancy occasioned by such removal, or by death, resignation, or inability to perform the duties. All reports which shall be confirmed, and all proceedings, orders, or decrees which shall be had under this act, or the act to which this is amendatory, shall be recorded by the clerks as other land causes are directed to be; and their fees for such services having been approved and allowed by the court, shall be paid out of the proceeds of the sales."

Sec. 7 relates to the duties of the auditor of public accounts, the register of the land office, and the clerk of the general court to furnish information to the commissioners, and I deem it unnecessary to insert it here.

"8. *Be it further enacted*, That when any tract of land so liable to be sold lies partly in more than one county, the same shall be reported, and sold by the commissioner or commissioners of the county in which the greater part may lie: and in the event it shall appear after the sale that the greater part shall not lie in the county where the sale shall have been made, the validity thereof shall not in any wise be affected thereby.

"9. *Be it further enacted*, That upon payment of all the purchase money by the purchaser, it shall be lawful for the commissioner to receive the same, first deducting the interest thereon at the rate of six *per centum per annum* from the time the same shall be paid until the time the same would become due and payable by

the terms of the sale, and thereupon the purchaser shall be entitled to his deed for the land so purchased and paid for, upon application to the said commissioners, but without warranty." The following sections down to and including section 16 are omitted, as not pertaining to the question in contest. But sections 17 and 18, and the preamble thereto, being the legislative proceedings referred to by the plaintiff *in error*, on which, in part, the validity of his title to the land in question depends, I insert the preamble and the resolutions here.

PREAMBLE.

"And whereas, James Swan, late of the city of Boston, died seized of various tracts or parcels of land in this commonwealth, lying west of the Allegheny mountains, which have been forfeited to the president and directors of the literary fund, or to the commonwealth; and whereas, the said James Swan, by his last will and testament, did direct that his estate, real and personal, should be first charged with the payment of his just debts, which estate, the personalty being of no value whatever, is wholly inadequate to the liquidation thereof; and whereas, it is represented to the general assembly that the debts of the said estate are chiefly due to the officers of the French Army who were in the American service during our revolutionary struggle, or the descendants of such officers, and originated in France after that period by loans and advances made under the promptings of a generous regard for an American citizen and a fellow soldier; and, whereas, the heirs of James Swan, impressed with the obligations of their ancestors to the said creditors, released to them all their interest in said estate, and the creditors, in order to realize some portion or amount due thereon, have placed the subject in the hands of John Peter Dumas, whose agent now here, believing the interest of the creditors will be consulted by abandoning the lands aforesaid if the taxes and damages thereon shall be exacted for their redemption, appeals to the liberality of the general assembly for their remission; therefore

"17. *Be it further enacted*, That all the right, title and interest of the commonwealth or of the president and directors of the literary fund, to any of the lands owned by James Swan, under title, legal or equitable, lying west of the Allegheny mountains and which have been forfeited to the commonwealth, or said literary fund, for the non-payment of the taxes thereon, or for failure to enter the same on the books of the commissioner of the revenue, and having the same charged with all taxes chargeable thereon,

and paying the same, with damages, as prescribed by law, shall be, and the same is hereby transferred to, and vested, except as hereinafter excepted, in John Peter Dumas, in trust, for the use and benefit of the creditors of James Swan, discharged from all taxes and damages charged and chargeable thereon, before the first day of January, eighteen hundred and thirty-eight.

"18. *Be it further enacted*, That the said John Peter Dumas shall be autho'ized to hold the said land for the use and benefit aforesaid, and that any sale made by him, or his legally constituted attorney in fact, of any part or parcel thereof, shall be valid and sufficient to convey the title with which he is hereby invested; *Provided, however*, That nothing in this or the preceding section shall in anywise affect the right or title of any *bona fide* occupant, whose rights are secured by any pre-existing law."

By reference to the case of *Reed vs. Dingess*, 60 Federal Reporter, 21, decided by the Federal Circuit Court of Appeals at Richmond, Va , it will be seen that these sections and their preamble, are the source of the plaintiff's claim of the title to the lands in question. And if the acts of the legislatures of Virginia and West Virginia forfeiting lands for the non-payment of taxes thereon, and for the failure of the owner to have them entered on the land books of the proper county and charged with taxes thereon, are unconstitutional and void, then the preamble and sections 17 and 18 of this act of 1838, are also unconstitutional and void, and, as to this matter, the parties are all in the same boat. And therefore this plaintiff has no title to, nor interest in, the land in question.

## Code of Virginia of 1849.

This Code contains the next legislation of Virginia to be considered. It was adopted by the legislature in 1848, and took effect on the first day of July, 1849, and is a revision and digest of all the laws of Virginia of a general nature down to the time of its adoption, in a single volume of 800 pages.

Chapters 35, 36 and 37, contain, in the order stated, all the laws for the assessment of taxes, the collection of taxes, and the sales of lands for taxes, without any material change from what they were before.

Chapter 35, of this Code, provided for the annual assessment of all the personal property subject to taxation, in each county of the Commonwealth, but not for the assessment of real estate. There never was a law either in Virginia or West Virginia requir-

ing an annual assessment of real estate in either state. But there has always been a periodical assessment, or re-assessment as it is called, in both states, under special statutes passed for the purpose. The last act for the re-assessment of the real estate in West Virginia, will be noticed further on. The provisions of chapter 35, of the Code of 1849, are so nearly identical with those of chapter 29 of the Code of West Virginia that I deem it entirely unnecessary to insert them here.

### Chapter 36, Code of 1849.

*Collection of Taxes on Property.*

The provisions of this chapter in reference to the collection of taxes by distress and sale of property, and the lists of delinquents who fail to pay their taxes are all of the chapter to which I propose to call attention. They are sections *two*, *four*, *five*, *seven*, *nine*, *ten*, *sixteen*, *seventeen*, *eighteen*, *nineteen*, and *twenty-one*, and are as follows:

"2. Each sheriff or collector shall commence his collections yearly, on the first day of July, or as soon thereafter as he may receive a copy of the commissioner's books.

"4. If the taxes with which any person or any estate of a decedent is assessed, be not paid before the first day of September, the sheriff or collector may distrain.

"5. On affidavit before a justice, by the sheriff or collector that he has good cause to suspect and verily believes that a person assessed with taxes intends to remove his property out of the county or corporation, and that in his opinion it is probable such taxes will be lost, unless he be authorized to distrain therefor before the first of September, it shall be lawful for the justice to give such authority.

"7. Any goods or chattels in the county or corporation, belonging to any person or estate assessed with taxes may be distrained therefor.

"9. Where taxes are assessed on a tract of land lying partly in one county and partly in another, the sheriff of the county in which the taxes are so assessed, may distrain on that part of the land lying in the other county, in such manner as if such part was in his own county.

"10. No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed, while such goods and chattels re-

main in the grantor's possession; nor shall such deed prevent the goods and chattels from being distrained and sold for the taxes assessed thereon, no matter in whose possession they may be found.

"16. The sheriff or collector, after ascertaining which of the taxes assessed in his county or corporation cannot be collected, shall, as soon as practicable, in each year, after the first day of October, make out lists of those classes, to-wit: first, a list of property on the commissioner's books, improperly placed thereon, or not ascertainable with the amount of taxes charged on such property; secondly, a list of other real estate which is delinquent for the non-payment of the taxes thereon; and thirdly, a list of such of the taxes so assessed, other than on real estate as he is unable to collect.

"17. In the lists mentioned in the preceding section, the names of the persons charged with taxes shall be placed alphabetically. The list mentioned secondly shall be in the following form:

*List of real estate in the county of——, delinquent for the non-payment of the taxes thereon for the year——*

| Name of person | Residence. | Estate held. | Quantity of land. | Description and local situation of land. | Distance and bearing from court house. | Amount of taxes. | Why returned delinquent. |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

And the sheriff or collector returning such list shall, at the foot thereof, subscribe the following oath: *I, A. B., sheriff* (or deputy sheriff) *of——, do swear that the foregoing list is, I verily believe, correct and just; that I have received no part of the taxes for which the real estate therein mentioned is returned delinquent; and that I have used due diligence to find property within my county liable to distress for said taxes and have found none.*

"18. The lists mentioned first and thirdly in the sixteenth section, shall each of them be verified by the oath of the sheriff or collector; and a copy of that thirdly mentioned shall be posted at the front door of the court house of the county or corporation on a court day, during the term next preceding that at which the list may be presented to the court under the following section:

"19. Each of said lists shall be presented to the court of the county or corporation and examined by the court. The court being satisfied of the correctness of said lists, or having corrected

them, if erroneous, shall direct the clerk to certify copies thereof to the first auditor, and a copy of that first mentioned to the commissioner of the revenue, who shall correct his books accordingly. The original lists shall be preserved by the clerk in his office. After the said copies are so directed to be certified, the sheriff or collector shall not receive any of the taxes mentioned in the said lists, but they may be paid into the treasury, or the personal property tax may be paid to the clerk of the county, or corporation, who shall be accountable therefor in like manner and at the same time as for taxes on law process.

"21. The copies of lists directed to be certified to the first auditor shall be placed by the clerk in a sealed enclosure directed to that officer and delivered to the sheriff or collector by whom the lists were returned. The auditor shall credit the sheriff or collector with the amount of taxes mentioned in such lists, if the said lists be presented at his office before the first day of May next, after the said taxes were assessed, but not otherwise." This chapter remained the law of Virginia without any material change until June 20, 1863, when West Virginia became a State of the union.

### Chapter 37 of the Code of 1849.

This chapter is entitled, "*Mode in which lands returned delinquent for taxes since March, eighteen hundred and thirty-two, are sold therefor, or vested in the Commonwealth.*"

Sections *one* to *twenty-two* of this chapter provide very fully for the sale and conveyance of lands returned delinquent for the non-payment of the taxes thereon, and purchased by individuals. But there is nothing in the chapter relating in any way to the lands forfeited for non-entry on the land books. And I deem it unnecessary to insert any of these sections here. But there are two sections in many of the statutes already referred to found in this chapter, to which I desire to call attention, as follows:

"24. When any real estate is offered for sale as aforesaid, by the sheriff or collector, and no person present bids the amount to be satisfied from the sale thereof; the sheriff or collector shall purchase the same on behalf of the Commonwealth for the taxes thereon, and the interest on the same, and its proportion of the expense of advertising. A list of the real estate so purchased by the Commonwealth shall be made out by the sheriff or collector. After it shall have been verified by him on oath, the court of his county or corporation shall direct its clerk to make out a copy

thereof and deliver it to the commissioner of the revenue, and shall cause the original list to be certified to the first auditor. Such copy and list the clerk shall deliver and certify accordingly. The list for the auditor he shall place in a sealed enclosure, directed to that officer, and deliver to the sheriff or collector. Upon receiving said list, the auditor shall credit the sheriff or collector with the amount for which said real estate may have been so purchased; but not with any commissions thereon.

"25. The first auditor shall cause all the lists received in his office under the preceding section, to be recorded in a well bound book; and all the real estate mentioned in such lists, shall, without any deed for the purpose stand vested in the Commonwealth."

Under this chapter lands were sold for the non-payment of taxes, once in every five years. And the succeeding section gave to the former owner, among others, the right to redeem the lands so purchased for the Commonwealth until they were again offered for sale at the next regular sales of lands forfeited to the State, as then provided by law. Such were the laws of Virginia on this subject at the time West Virginia became a State of the Union, June 20, 1863.

And section 8, of Article XI, of the first Constitution of this State, among other things, provided as follows:

"8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature."

## Code of West Virginia.

This Code was adopted by the Legislature in 1868, and took effect July 1st, 1869. It was based on the Code of Virginia of 1849, and chapters 35, 36 and 37, of that Code, became chapters 29, 30 and 31, of the Code of West Virginia, with no substantial difference between them.

The officer called the commissioner of the revenue in the Code of Virginia, is call the *assessor* in the Code of West Virginia, but their duties were and are precisely the same. Chapter 29, of the Code of West Virginia provides very fully and carefully for the assessment of all the personal property in the State not exempt from taxation, in each and every year, but not for the assessment of taxes on real estate. There never was a general law, either in Virginia or West Virginia, for the annual assessment of taxes on

real estate. And prior to the formation of the State of West Virginia, a re-assessment of the real estate in all the counties of Virginia was made periodically, under special laws passed by the General Assembly, for the purpose, at intervals of about ten years apart. And West Virginia still pursues that course in the re-assessment of real estate for taxation. But chapter 23 of the Code of Virginia, edition of 1887, provides for the re-assessment of the taxes on lands throughout the State in 1890, and in every fifth year thereafter, by commissioners to be appointed for the purpose.

The last act of the legislature of West Virginia, providing for a re-assessment of the lands throughout the State, was passed February 27, 1891, and is found in the session acts of that year, commencing on page 60.

Sections *one, two and seven* of said act, are as follows:

"1. The board of public works shall appoint one commissioner for each assessment district in the several counties of this State, who shall be a resident freeholder of such district, and who shall not be a land broker or speculator in lands, whose duty it shall be to reassess the value of all real estate therein.

"2. Each commissioner so appointed shall within thirty days after notice of his appointment execute a bond with security in the penalty of three thousand dollars, conditioned for the faithful performance of his duties, to be approved by the county court, or the clerk thereof in vacation, with two or more good securities, and shall take an oath to support the constitution of the United States and the constitution of this State, and that he will faithfully and impartially discharge the duties of his office to the best of his skill and judgment, and that he will neither directly or indirectly receive nor agree to receive any gift or reward, from the owner of any land in his assessment district or other person, to influence his action in the making of such assessment, and that he will assess all the real estate in his district without bias, fear or favor. The said bond and oath shall be filed in the office of the clerk of the county court, and the bond be duly recorded, by said clerk, who shall certify a copy thereof within ten days thereafter to the auditor, and also furnish the auditor the postoffice address of the commissioners. If the said commissioners so appointed shall fail to qualify and give bond as herein required, within the time prescribed, or in case he shall die or resign, before making or completing his revaluation, or the office otherwise become vacant, a successor shall be immediately appointed by the board of public works, who shall at once give bond and qualify as herein prescribed, and enter upon the duties of the office."

7. Any person feeling himself aggrieved by the assessment of his real estate or other property, as herein provided for, made under the provisions of this act, may within one year after the filing of a copy of such assessment with the clerk of the county court apply, by himself or his agent to the said court for redress, first giving reasonable notice in writing of his intention to the prosecuting attorney, and stating in such notice the character of the correction he desires. It shall be the duty of the prosecuting attorney, upon being so notified, to attend to the interests of the state at the trial of such application. If upon hearing the evidence offered, the county court shall be of opinion that there is error in the assessment complained of, or that the valuation fixed by the commissioner is too high or too low, the said court shall make such order correcting the said assessment as is just and proper. The right of appeal from any such order made by the county court shall lie to the circuit court, and may be taken either by the applicant or the state, and in case the applicant, or the state by its prosecuting attorney or agent desires to take an appeal from such order, the party desiring to take such appeal shall have the evidence taken at the hearing of the application certified by the county court and such appeal, when allowed by the court or judge in vacation, shall have precedence over all other cases pending in such court. A copy of any order or orders entered in any court, making any such corrections as is herein provided for shall be made and certified to the auditor by the clerk, within twenty days after the entering of the same; such application shall have precedence of all other business before the court; but any order or judgment made upon such application shall show that the prosecuting attorney was present and defended the interest of the state, and in the event it shall be ascertained that the land has been assessed too high, and the owner has paid the excess of such taxes, the court shall order that the excess shall be refunded to him and if not so paid he shall be relieved from such excess. No costs of such application shall in any event be taxed against the state, but if the applicant fail to obtain any relief upon the hearing of his application, he shall be taxed with the costs of the officers of the court incurred therein, otherwise no costs shall be taxed against such applicant."

A provision similar to this has always been inserted in every act for the re-assessment of real estate of which I have any knowledge.

The "other property" referred to in the preceding section, has reference to that part of section 4 of the act which reads as follows: "And when mineral, mineral water, oil, gas, or coal privi-

leges or interests, are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties, company or association, at its cash or market value at the time of such re-valuation."

But while there is no annual assessment of real estate in West Virginia, the land books in each county in the State as annually made out anew, as we have already seen, by the clerk of the county court of each county, in order to make the necessary corrections and changes in it, from the land-book of the preceding year, by transfers of lands from one to another and otherwise. (See pages 13, 14, of this brief.)

Chapters 30 and 31 of the Code of West Virginia, are so nearly identical with chapters 36 and 37 of the Code of Virginia of 1849, that I deem it unnecessary to insert but few of the sections of either chapter here.

### Chapter 30, Code of West Virginia.

*Of Distraining for Taxes.*

"7. Any goods or chattels in the county belonging to the person or estate assessed with taxes, may be distrained therefor after the first day of November in the year for which the taxes were assessed, or before that day, if such goods or chattels are about to be removed from the country.

"8. When taxes are assessed on land partly in one county and partly in another, the sheriff or collector of the county in which the taxes are so assessed, may distrain on that part of the land lying in the other county."

"10. No deed of trust or mortgage upon or sale of goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed, or the former owner thereof, while such goods and chattels remain in the grantor's or owner's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

Sections 18 to 24, inclusive, provides for making out and return of the list of persons delinquent for the non-payment of taxes assessed on lands and personal property, to the county court and to the auditor. And the next chapter provides what shall be done with the lands so returned delinquent.

CHAPTER 31 PROVIDES FOR THE SALES OF LANDS RETURNED DELINQUENT FOR THE NON-PAYMENT OF THE TAXES THEREON.

This chapter has been amended and re-enacted several times, and the sections I propose to insert here, are from the chapter as last amended in 1882. These sections are *four*, *six*, *seven*, *thirty-one*, *thirty-two*, *and thirty-three*.

"4. On or before the first day of November, in the year one thousand eight hundred and eighty-three, and in every second year thereafter, the auditor shall cause to be delivered to the sheriff or collector of the taxes for every county, two lists of the real estate therein, which at the time said lists are made out, shall have been returned delinquent for the non-payment of the taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for State and State school taxes; county taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes, and municipal corporation taxes for all purposes, on each tract or lot for each year, with interest on each amount from the twentieth day of January in the year succeeding that in which such taxes were levied, until the first day of November in the year such lists are delivered as aforesaid to the sheriff or collector, at the rate of twelve per centum added thereto. But if the real estate has been sold for the non-payment of taxes, the same shall not be charged with, or again sold on account of any tax for any previous year to that for the taxes of which the same was made; except, that if for any cause a previous sale of real estate purchased by or in behalf of the State, has been or shall be set aside by the court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists."

"6. Within ten days after receiving such lists the sheriff or collector shall make out and cause to be published, once in each week for four successive weeks, in some newspaper published in the county, prior to the day of sale, an abstract of such list, in form or effect as follows:

*Sale of Real Estate for Taxes.*

"Notice is hereby given that the following described tracts or

lots of land in the county of ————, which are delinquent for the non-payment of taxes for the year (or years) 18—, will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the court house of said county, between the hours of ten in the morning and four in the afternoon on the —— day of ———, 18—. Each tract or lot, or so much thereof as shall be necessary, will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

| Name of person charged with taxes | Quantity of land. | Local description. | Total amount of taxes, interest, costs of publication and commissions, being amount necessary to redeem before sale. | Total amount of taxes, interest, costs of publication, commissions and fee for receipt. |
|---|---|---|---|---|
| | | | | |

"Any of the aforesaid tracts or lots may be redeemed by the payment to the undersigned, sheriff (or collector,) before sale, of the amount due thereon.

"Given under my hand this —— day of ———, 18—.

A B ——

"Sheriff (or Collector.)"

The real estate mentioned in such list, or so much thereof as shall be sufficient to satisfy the taxes, with the interest on the same, and a commission of five per cent. on the whole amount to the sheriff or collector, shall be sold at public auction between the hours of ten in the morning and four in the afternoon, on the first day of the next November or December term of the circuit or county court of the said county, whichever may be held first after the posting of said list and the publication of said notice as herein required; or if no term of either court be held in said county in November or December, then on the second Monday in December next thereafter, unless the said taxes, interest and commissions are sooner paid to the sheriff or collector, or into the treasury of the State. He shall also, as soon as such abstract is published the first time in a newspaper, as herein required, post one of the copies of the list received from the auditor, on the front door of the court house, with a like notice appended thereto. If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, said sale shall be coommenced on the first day

of a circuit or county court for such county, whichever may be held first in the succeeding year next after the publication of such notice of sale." The balance of this section relates to other matters than the sale, and is omitted.

"7. If the said taxes, interests, costs of publication and commissions be not previously paid, the sheriff or collector shall proceed to make said sale, and if the same be not completed on the day named in the notice thereof, it shall be continued from day to day (Sundays excepted) between the hours aforesaid until it shall be completed." The balance of the section relates to the suspension of the sale for reasons appearing to the sheriff and is therefore omitted.

LANDS PURCHASED BY THE STATE FOR TAXES.

"31. When any real estate is offered for sale as aforesaid, and no person present bids the amount of taxes, interest and commissions due thereon, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest on the same, and shall make out a list thereof under the following caption:

"List of real estate charged with taxes and sold in the county of ——, in the month (or months) of ——, one thousand eight hundred and ——, for the non-payment of taxes due thereon for the year (or years)——, and purchased for the State of West Virginia.

Underneath shall be the several columns mentioned in the tenth section, with a like caption to each column, omitting, however, the column headed "name of purchaser." The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the State during the year——, and return the list with a certificate of the oath attached, to the clerk of the county court within ten days after such sale, who shall within twenty days after such return record the same in a well bound book and transmit the original to the auditor. Upon receiving said list the auditor shall credit the sheriff or collector with the amount for which the real estate therein specified was purchased, but not with any commission thereon.

"32. The auditor shall cause all the lists received in his office under the preceding section to be recorded in a well bound book, and all such estate, right, title and interest in the real estate mentioned in such lists as would have vested in an individual purchaser thereof at such sale, who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall be

by the sale and the purchase on behalf of the State vested in the State, without any deed or other conveyance therefor to the State; subject, however, to the right of redemption mentioned in the next section.

"33. The previous owner of any real estate so sold and purchased for the State, his heirs or assigns, or any person having a right to charge it for a debt, may within one year from the sale thereof, redeem the same by paying into the State treasury the amount of all State, State school, county, school district, independent school district and other district taxes, and all municipal corporation taxes, with the interest due on each class of taxes at the time of such purchase, including such taxes as were or should have been assessed thereon for the year in which the same was sold and the cost of publication of such real estate in the delinquent list, together with such additional sums as would have accrued thereon for all of such taxes if the same had not been purchased for the State, with interest thereon at the rate of twelve per cent. per annum from the twentieth day of January in the year following that in which the same would have accrued."

Under the Code of Virginia, of 1849, the lands purchased for the commonwealth and not redeemed when West Virginia became a State, would, but for that fact, have been again offered for sale with the other lands to be sold for the non-payment of the taxes thereon. But, by the provisions of the first constitution of West Virginia, already referred to, the title to such lands was vested absolutely in the State, and they were required to be sold, with the other lands mentioned in said Constitution, subject to redemption in five years from June 20, 1863.

And now, it plainly appears that from 1629 to the present time, a period of 268 years, it has been the "custom and usage" of the State of Virginia, down to 1863, when West Virginia became a State, and of West Virginia from that date to the present, to collect their taxes by distress, a sale of personal property, and by sales of real estate made under statutes passed by the legislatures of both States, and never by judicial process. And if anything can be established by *custom* and *usage* as "the law of the land," this manner of collecting taxes, has been so established.

And for many years in Virginia, prior to the year 1800, real estate was distrained and sold for the payment of the taxes assessed thereon, the same as personal property. But this manner of collecting the taxes on real estate was finally abandoned, and the present manner of collecting the taxes thereon was adopted in its stead.

CHAPTER 105 of the Code of West Virginia, as adopted in 1868, provided for the sale of all the lands then owned by the State, for the benefit of the school fund. In 1872, as already stated, a new constitution for the State was adopted. Section *four* of article *thirteen* of which provides as follows:

"4. All lands in this State, waste and unappropriated, or heretofore, or hereafter, for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder." Since the adoption of this Constitution this chapter of the Code has been three times amended and re-enacted.

And the last time it was so amended, was on the 23d of February, 1893. And this chapter as then amended changes the proceedings for the sale of all the lands belonging to this state, including those forfeited "for any cause" to the State, into a *judicial* instead of an *administrative* proceeding. And I will insert here only such sections of said chapter, as amended, as will enable this Honorable Court to comprehend this change. These sections are *one*, *two*, *four*, *five*, *six*, *seven*, *sixteen*, *seventeen*, *eighteen*, and *twenty-two*.

"SEC. 1. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, transferred, or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall, by proceedings in the circuit court of the county in which the lands or a part thereof are situated, be sold to the highest bidder for the benefit of the school fund, in the manner hereinafter provided." This section is section *four* of article *thirteen*, of the Constitution of the State above quoted, enacted into this statute down to and including the words, "the highest bidder," the remainder of the section being added by the legislature.

"SEC. 2. A record of all real estate forfeited for any cause to the State of West Virginia under the Constitution and laws thereof, or purchased for the State at a sheriff's sale for taxes, and not redeemed or released according to law, which has or shall come to the knowledge of the Auditor, shall be kept by him in a well bound book, in his office, in which shall be stated the name of the

former owner thereof, if known, and if not that fact shall be stated, the quantity or supposed quantity of such real estate, the local or other description thereof, as certified to him, for what years the owner thereof was not charged with taxes thereon, and when said real estate became forfeited. Such record shall be *prima facie* evidence that the owner of such real estate was not charged with the taxes thereon for any of the years stated therein, and that he did not cause said real estate to be entered and charged with taxes as required by law, and that such real estate was forfeited, and the title thereto vested in the State at the time specified. In order to enable the Auditor to make such record, it shall be the duty of the clerk of the county court of each county in which any such real estate ought to have been, but was not entered on the land books and charged with the taxes thereon, upon discovering any such failure, to certify the same, and all the facts in relation thereto, to the auditor; and a duplicate of such certificate shall be filed in his office and recorded in the book mentioned in section fourteen of chapter thirty-one of this code. The auditor shall certify to the commissioner of school lands of the proper county, copies of all the certificates of any such clerk received by him within sixty days after receiving the same, except lands purchased for the state at a sheriff's or collector's sale thereof for taxes, which shall be certified by the Auditor to the commissioner of school lands, immediately after the expiration of twelve months from the date of such purchase.

"Sec. 4. The circuit court of every county shall from time to time appoint a commissioner of school lands for such county, who shall do and perform the duties and exercise the powers hereinafter provided for. Every such commissioner shall, before entering upon the duties of his office, take an oath in open court that he will faithfully, to the best of his skill and judgment, execute the duties of his office, and shall give bond with good security, to be approved by the court, in the penalty of at least two thousand dollars, conditioned that he will faithfully and impartially discharge the duties of his office, and will pay over and account for, according to law, all moneys, bonds and other securities, which may come into his hands by virtue of his office. He shall, as far as possible, see that every officer, having any duty to perform under this chapter, performs the same as therein required, and report any failure of any such officer to do so to the circuit court of his county. The court may, whenever in its opinion it is proper to do so, require such commissioner to give a new or additional bond, as prescribed by section twenty of chapter ten of the Code of West Virginia, and all the provisions of said section, and of sec-

tion twenty-one of said chapter, shall be applicable to said new or additional bond when given."

"SEC. 5. It shall be the duty of the commissioner of school lands of each county to report to the circuit court of his county from time to time, and at least once in each year, a list of all tracts and parcels of land, if any, lying in whole or in part in his county, reported to him by the auditor and surveyor as required by the second and third sections of this chapter, or which shall otherwise come to his knowledge, which in his opinion are liable to be sold for the benefit of the school fund.

"SEC 6. Every such report shall be recorded in the chancery order book of said court, and filed and preserved by the clerk of said court in his office, and thereupon a suit or suits in chancery shall be commenced and prosecuted by and in the name of the State of West Virginia for the sale of every such tract and parcel of land so reported, as required by section four of article thirteen of the constitution of this State. All such tracts or parcels of land mentioned in any such report, not exceeding in quantity one thousand acres, may be included in one suit, but a separate suit may be brought and prosecuted for the sale of each tract of land exceeding in quantity one thousand acres; and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same was forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or an interest in any such lands shall, also, as far as known, be made defendants therein. And any person claiming an interest in any such land or in the proceeds thereof, not so made defendant, may file his petition in any such suit, stating what interest he claims therein, either in open court or before a commissioner in chancery while the suit is pending before him, or at rules, if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interests, if he has any therein, to the same extent as if he had originally been made a party defendant therein." The balance of this section relates to other matters, which I deem it unnecessary to insert.

"SEC. 7. All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter one hundred and twenty-four of the Code, and proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the State courts of this State, except as herein otherwise provided. In all cases where an order of publication is

issued, there shall be therein set out the number of tracts in which non-residents are interested as owners or claimants, with a general description as to the location and quantity of each."

"SEC. 16. The former owner of any such land, his heirs, personal representatives, or assigns, or any creditor having a lien on said land at the time of the forfeiture and still existing, shall be entitled to recover, in whole or in part, the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon since the formation of this State, with interest at the rate of twelve per centum per annum. And the costs of the suit of his claim be filed in the circuit court that decrees the sale, within one year after the sale is confirmed. Such former owner, his heirs, personal representatives or assigns, or any such creditor may, within the time aforesaid, file his petition in the suit in said circuit court, stating in full his title to or lien upon such lands, accompanied by the evidence thereof, and upon full and satisfactory proof that at the time the title to said land, vested in the State, the said former owner had a good and valid title thereto, legal or equitable, superior to that of any other claimant thereof the court shall order the excess mentioned herein, or so much thereof, as he may prove himself entitled to, be paid to such owner, his heirs, personal representatives, assigns or creditors, as the case may be; and for the purpose of ascertaining the same, the court may refer the several matters in question to a commissioner thereof; and upon a properly certified copy of such order being presented to the auditor he shall draw his warrant on the treasury, in favor of such owner, his heirs, devisees, personal representatives, assigns, or such creditors, for such excess. And every such suit shall remain upon the docket of the court for one year after the de ree confirming any sale of land therein mentioned, in order that opportunity be given for the filing of such petitions.

"SEC. 17. The former owner, his heirs, devisees or assigns, of any real estate forfeited for any cause to the State of West Virginia, may at any time during the pendency of the suit for the sale thereof, and before a decree for the confirmation thereof has been made and entered by the court, file his petition therein in manner and form as provided in the next preceding section in relation to the excess of the proceeds of such sale, praying to be allowed to redeem so much only of such real estate as to which the title still remains in the State; and upon the filing of such petition, and upon such proof being made as would entitle the petitioner to the excess of the purchase money of such real estate if the same had been

sold, the court may by a proper decree, permit the petitioner upon the payment into court or to the commissioner of school lands, the costs, taxes and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in his petition. And upon such payment being made as aforesaid, the court shall enter its decree declaring the redemption of said real estate by said petitioner, so far only as the title thereto is in the State, as provided in this chapter, and so far as the petitioner has shown himself entitled to redeem the same; which decree shall operate as a release of such forfeiture of said real estate to the extent declared therein, and of all former taxes and interest charged and chargeable thereon. And such petitioner shall acquire no other title to the land so redeemed than was vested in him immediately before such forfeiture, but such redemption shall in no wise affect or impair any right, title or interest any person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of section three of article thirteen of the constitution of this State."

*Jurisdiction of Courts, &c.*

"SEC. 18. In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundaries which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein; and the court, in its discretion, may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And every such issue shall be proceeded in, and the trial thereof shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant new trials therein as in other cases tried by a jury."

*Appeals.*

"SEC. 22. Appeals from and writs of error or *supersedeas* to the decrees, judgments and orders of the circuit court, rendered or made under the provisions of this chapter, may be had and taken and allowed as provided in chapter one hundred and thirty-five of this code, and all the provisions of that chapter, so far as applicable, shall apply to appeals, writs of error and *supersedeas* under this chapter."

And thus, it will be seen, that while the State of West Virginia

still pursues the same old and uniform remedy in the collection of her taxes assessed on real estate, and forfeiting the same for the failure of the owners thereof to cause their lands to be entered and charged with taxes on the land books of the proper county or counties in which they are chargeable with taxes, by "the law of the land," and not by judicial process or proceedings, she has now provided for the sale of her own lands by a regular suit in chancery, in which the former owner of the lands, if known, and every other person known to be claimants of any interest therein, are required to be made parties defendants in such suits, with the privilege of proving their title to the land at the time of the forfeiture thereof and having the excess of the purchase money paid for the said lands at the sale thereof, if a sale be made, paid to them, or of redeeming their said lands from the forfeiture thereof by paying into court all the charges thereon for taxes, interest and costs, as provided by the statute. And the right is given them, if they are not made defendants in the suit when brought, to appear, make themselves defendants by petition, and to defend their interest in the lands in question, the same as in any other chancery suit, and finally to appeal, as in any other case, from the final decree entered in the suit. All the State asks now of these tax dodgers is to come forward, prove their title, pay what they owe to the State, including costs, and take the lands as far as they have not already been disposed of by the State. *What more can such people ask?*

I stop here in the regular course of the argument to call the attention of this Honorable Court to the case of *McClure v. Morperture*, 29 West Virginia, commencing on page 633. There is no point of law decided in this case to which I wish to call attention, but it is the statement of *facts* in that case by Judge Green in delivering the opinion of the court, commencing on page 633, and ending on page 638, to which I desire to call *particular* attention.

When, on page 12, of this brief, I ventured (in parenthesis) to question the truth of the plaintiff's claim to having paid all the taxes due on the tract of 500,000 acres of land in question to and including the year 1883, when he made his so-called redemption of said tract from forfeiture, I knew that I was right, but could not remember *how* I knew it. I had at that time forgotten the fact that I was one of the counsel of the Morpertures and the Pittsburg National Bank of Commerce, in that case, in our Court of Appeals; and to-day, in reading the statement of that case by Judge Green, I remembered *how* I knew it.

This statement shows the following *facts:*

1. That the proceeding commenced by the commissioner of

school lands of Wyoming county, was for the sale of 300,000 acres of the 500,000 acres of land granted to Robert Morris, and now claimed by Henry C. King, plaintiff *in error* in the case now pending in this Honorable Court.

2. That the petition of said commissioner alleged the forfeiture of said 300,000 acres of land in the name of A. D. Morperture, for the non-payment of the taxes thereon for the years 1874, 1875 and 1877, and 200,000 acres, the residue thereof, in the name of R. E. Randall, individually, for the non-payment of the taxes for the year 1870.

3. That both the above parcels of land were sold for the non-payment of the taxes charged thereon, and were purchased by the State of West Virginia, and, of course, not redeemed, or there would have been no proceedings to sell them.

4. That it was stated in said petition that Black, Snydam, Reed and the Pittsburg National Bank of Commerce, apparently had an interest in this tract of land, and that deeds showing such interest were filed with the petition.

5. That the interest so claimed by them was derived from Robert Morris who had many years before obtained a patent for this land, and that deeds were also filed with said petition, showing that A. D. Morperture's heirs also, had an interest in the lands asked to be sold. And all the parties named were made parties to the proceeding.

6. That Robert E. Randall appeared and represented himself as the trustee of A. D. Morperture's heirs, and as such to have an interest in the land, and to have "a title superior to all others." It was evidently Randall's intention at this time to redeem the land in the name of Morperture's heirs, which as he then supposed, would cost but little, and would answer all of *his* purposes in the matter. But in some way, which does not appear, his game was blocked.

7. That the case was referred to a commissioner, who reported that the taxes, damages, and interest from 1839 to 1860 at *12 per cent.* amounted to $191,141.37, and at six *per cent.* to $145,906.34. But that in his judgment the proper amount should be *12 per cent.* from the formation of this State and charging only when the land tax was probably not paid, the taxes due on the 200,000 acres would be $77,254.72, and on the 300,000 acres $44,892.23. The costs of the proceedings were $202,508.

8. That this report was excepted to by Randall; and that the Pittsburg National Bank of Commerce filed its petition and asked

to redeem 300,000 acres, calling it three-fourths of the 500,000 acres, if a forfeiture had occurred, but protesting that no forfeiture of this land, or of any part of it had occurred, and averring that the greater part of the 500,000 acres lay in Logan county, where it had been put on the assessor's books and taxed, and the taxes paid.

9. That after this Randall was permitted to file an answer to the bank's petition; and, also, to amend his own petition. That in his answer or amended petition, he set up a different claim to the land from that set out in his first petition, and claimed the land as trustee for the creditors of James Swan. He traces his title in this amended petition, to an act of the Legislature of Virginia passed in 1838, vesting title to this land in John Peter Dumas, as trustee, of the creditors of James Swan, and exhibits his substitution as trustee.

10. That the decree permitting this new claim of Randall, as trustee, to be set up, referred the cause to a commissioner to report on various matters designed to enable the court to dispose of the cause. And that in response the commissioner reported the number of acres of land in each of the counties of Wyoming, McDowell and Logan, in West Virginia, which report was excepted to by Randall. And the exceptions to this and the former report, were sustained.

And on the 10th day of April, 1883, the cause came on for a final hearing, when the court rendered its decree as follows:

"The court is of opinion that at the time of the forfeiture of the land mentioned in the cause, or any part thereof to the State for the non-payment of the taxes for the failure to have the same placed upon the land books, or any part thereof, and at the time the title thereto, or to any part thereof, vested in the State for any of said causes. Robert E. Randall, trustee of the Swan estate, had the title thereto superior to all other claimants and now has the right either as creditor of A. D. Morperture or those claiming under him, or as owner of the same, or of a portion of said tract, and as owner of the whole or part thereof, and as creditor of A. D. Morperture, having a lien thereon, to redeem and pay the taxes on the whole of said tract of 500,000 acres originally granted to Robert Morris, assignee of Wilson Cary Nicholas, on the 23d day of June, 1795, and that the title of said Randall, trustee, as aforesaid, at the time of said forfeiture, was superior to that of the Pittsburg National Bank of Commerce or any other claimant of said land; and it being agreed and admitted in open court that the whole amount of taxes, costs and interest due upon

said tract is $8,000.00, and the commissioner of school lands aforesaid agreeing to and accepting that amount in payment in full of all taxes, costs, interest and damages up to and including the year 1883. And it further appearing that the said Robert E. Randall, trustee as aforesaid, has paid to the plaintiff this day in open court all taxes, damages, costs and interest heretofore unpaid thereon, and amounting to the sum $8,000.00, it is therefore, adjudged, ordered and decreed that the payment aforesaid operate as a release and exoneration of all former taxes on said land, and that no sale thereof shall be made," &c.

And this decree is unquestionably the evidence which the plaintiff gave to the jury in the court below, "tending," as his bill of exceptions says, to prove that all the taxes chargeable upon said tract of land up to and including the year 1883, had been fully paid and discharged by Robert E. Randall, trustee, under whom the plaintiff claims title."

And taken altogether, this is the most remarkable decree I have ever met with in all my practice. The petition was filed for the sale of 300,000 acres of this 500,000 acres of land forfeited in the name of A. D. Morperture, and not in the name of Robert E. Randall, trustee, and this petition was never changed. Robert E. Randall appeared to the petition, admitted the forfeiture, claiming to be the trustee of the heirs of A. D. Morperture, and prayed to be allowed, as such trustee, to redeem the land from forfeiture. Then, without any evidence that the 300,000, or the 500,000 acres, had ever been entered on the land books of any county in his name, individually, or as trustee for the creditors of James Swan, or otherwise, and charged with taxes in his name, in any capacity, he was allowed by the court to shift his ground, change his answer and petition, and redeem the whole 500,000 acres of land, as the trustee of the creditors of James Swan. And then he was allowed by the court to enter into an agreement with the commissioner of school lands to redeem the whole 500,000 acres for $8,000.00, less than one-fifth of the smallest sum due the State for the taxes, interest and damages and costs in the opinion of the court's commissioner, ~~therefor~~. And I assert here, that if the law governing these proceedings at that time had allowed an appeal from this decree, it would have been promptly reversed by our Supreme Court of Appeals. And this case shows, beyond all question, that the tract of land so redeemed by Randall, trustee for the creditors of James Swan, was one of the very many tracts of lands, the title which was vested, or attempted to be vested, in John Peter Dumas, as trustee for the creditors of James Swan, deseased, by the act of the Legislature

of Virginia, passed March 15, 1838 (pp. 58, 59, 60, of this brief.)

And now I proceed with argument from the point where I left off.

The people of no State in this Union are interested to anything like the extent that the people of West Virginia are, in the maintainance of the statutes of the State of Virginia and West Virginia, forfeiting lands for the non-payment of the taxes *assessed* thereon, and for the non-entry by the owners of lands on the land books of the county in which they are situated, in order that they may be *assessed* with the taxes chargeable thereon. Under the provisions of the Act of the General Assembly of Virginia, passed March 30, 1837, before referred to, (pages 56, 57, 58, of this brief), many millions of acres of land lying, to a greater or less extent, in a large majority of the counties now comprising the State of West Virginia were sold and purchased by the citizens of these counties, and are now held by them, or their heirs at law, or by others claiming under them. These lands in their, then, wild and unoccupied condition, were comparatively, worthless. But now, in their settled and improved condition, they have became valuable, and are much sought after by speculators and land grabbers. And if the laws of Virginia under which these lands were forfeited and sold, and the Constitution and laws of West Virginia, under which the tract of land in question in this suit was forfeited, should now be held by this Honorable Court to be unconstitutional and void, the effect of such a decision at this time, upon the land titles in the State of West Virginia, would, necessarily be disastrous. If an intelligent man, like Mr. King, the plaintiff *in error* in this case, would risk the purchase of a tract of 500,000 acres of land, mostly in West Virginia, and in a state of forfeiture to the State as the tract was at the date of his purchase thereof and of which he necessarily had notice, what would persons such as he not risk, if these laws were declared in this case to be unconstitutional and void? But in view of the authorities already referred to, and of those which follow, I can not anticipate such a decision.

And fortunately for the thousands of the citizens of West Virginia, the title to whose lands depend upon the validity of these laws, they have already stood ordeal of the courts of Virginia and West Virginia and also of this Honorable Court. The cases in the Court of Appeals of Virginia, to which I allude, are in part the following:

*Staats v. Board*, 10 Grattan 400-402.

*Wild's lessee v. Serpell*, 10 Grattan, 405.

*Hale v. Branscum*, 10 Grattan, 418.

*Levassar v. Washburn*, 11 Grattan, 572, 581.

These cases all involved the validity of the Act of the General Assembly of Virginia, passed February 27, 1835, forfeiting lands for the failure of their owners to enter them on the books of the assessor (now called the land books) and charged with taxes in his name. And in each of these cases the validity of this act was sustained.

In the case of *Staats v. Board* the *first* and *third* points of the syllabus are as follows:

"1. Land having been forfeited under the act of the 27th of February, 1835, Sess. Acts p. 11, for the failure to enter them on the commissioner's books, that forfeiture was complete on the first day of November, 1836, the period limited in which the forfeiture might be saved by complying with the provisions of the act of March 23d, 1836."

This last named act extended the time given by the act of 1835 for a compliance with its provisions from the 1st day of July, 1836, to the 1st day of November, 1836. (Pp. 52, 55, of this brief.)

"3. The forfeiture in such case became absolute and complete by the failure to enter and pay the taxes on the land and the damages, in the manner prescribed by the act of the 27th of February, 1835 And no inquisition, or judicial proceeding, or inquest or finding of any kind was required to consumate this forfeiture."

In the case of *Wild's lessee v. Serpell* the *first* and *second* points of the syllabus read thus:

"1. The statutes of Virginia forfeiting lands to the commonwealth for the failure of the owner to enter them upon the commissioner's books and pay the taxes due thereon, are constitutional.

"2. The forfeiture under these statutes is perfected without a judgment, decree or other matter of record, or inquest of officer, but by the operation of the statutes the title is divested out of owner and is vested in the commonwealth."

These points in the syllabus in both of these cases, contain an exact statement of what the court decided in both cases.

And in the case of *Armstrong v. Morrill*, 14 Wallace, 120, these cases, and the case of *Hale v. Branscum*, were commented upon and approved by this Honorable Court, (pp. 133, 134, 135 of the case.)

In this case, the court, speaking through Mr. Justice CLIFFORD, say: "Evidence was also introduced by the plaintiff showing that the land in controversy, on the 1st day of November, 1836, became forfeited to the State (of Virginia) by virtue of the second section of the statute passed on the 27th of February, 1835, as construed

by the Supreme Court or Court of Appeals, of the State, (here they refer in the margin to *Staats v. Board*, 10 Grattan, 400.)

Forfeiture, in such a case, became absolute and complete by the failure to enter and pay the taxes on the land and the damages, in the manner therein prescribed, and no inquisition or judicial proceeding or inquest or finding of any kind was required to consumate such a forfeiture. Here they refer in the margin, to all three of cases last named. And on page 135, they say: "Beyond all doubt the lands described in the deed of Robert Morris and others to the grantors of the plaintiff, became forfeited to the State by reason of the failure to enter the same on the books of the commissioners of the Revenue, as recited in the preamble to the act of the twelfth of February, 1844, in which it is stated that the grantors of the plaintiff petitioned 'the General Assembly for permission to redeem the lands upon the payment of all the taxes and damages therein."

In the case of *Lessar v. Washburn*, 11th Grattan 572, the third point in the syllabus reads as follows:

"3. The forfeiture of land for the failure to enter it upon the commissioner's books and pay the taxes and damages due upon it, was affected by the statutes, and required no judicial proceedings to complete it. The forfeiture was, therefore, complete at the time fixed by the statute."

The validity of the act of 1835 has also been passed upon by the Supreme Court of Appeals of West Virginia, in the case of *Vokum, Commissioner, v. Fickey, et al.*, 37 West Va. 762.

This case is in accord with all the others referred to, as to the forfeiture of lands for non-entry on the land books. The *third* point of the syllabus in this case is as follows:

"3. In such cases (non-entry of lands) the failure to enter and pay the taxes due on the land and the damages, in the manner prescribed by the act of February 27, 1835, caused the forfeiture to become absolute and complete, and no inquisition, judicial proceedings or inquest or finding of any kind was necessary to consumate such forfeiture."

These cases, except the one last named, decided later, were all commented upon with approval in the case of *McClure v. Maitland*, 24th West Va. 561.

In that case the court through Judge Snyder, say, pp. 575-6:

"In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the commonwealth of Virginia, now embraced within this State, were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither

pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement of the population of the State to an almost inconceivable extent. In this emergency and to remedy this calamitous evil the General Assembly of Virginia inaugurated the system of delinquent and forfeited laws that form the basis of the provisions of our present Constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the Legislature, the judiciary and the people, speaking through our present Constitution, to destroy and annihilate the titles of such delinquent owners, who should after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and those not in default. The purpose of the statutes passed to enforce this system was not merely to create a lien on these delinquent and unoccupied lands, but to effect by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes. The Constitutional competency of the Legislature to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owners by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the Court of Appeals of Virginia."

And he refers with approval to the cases hereinbefore mentioned, except the one last cited, which was decided since the decision in *McClure v. Maitland.*

*Smith v. Chapman, 10, Gratton* 445.

This was an action of ejectment tried and determined in the Circuit Court of Kanawha county, in which two large tracts of forfeited land were involved.

1. A tract of 94,600 acres granted by the Commonwealth of Virginia to George Keith Taylor by patent bearing date November 4th, 1796; and

2. A tract of 50,000 acres of land granted by said Commonwealth to Boies and Fally as assignees of one Porter, by patent bearing date April 1st, 1777.

The 94,600 acres was reported to the Circuit Court of Kanawha county by the commissioners of delinquent and forfeited lands for that county in November, 1841, as forfeited to the commonwealth for the failure of the owners thereof to enter it on the land books

of the commissioner of the revenue of Kanawha county, and the same was sold under the order of said court by said commissioners of delinquent and forfeited lands and five lots of the same, numbered 4, 5, 6, 7 and 8, were purchased by Hiram Chapman, the plaintiff in this suit. The 50,000 acres situate partly in Kanawha county and partly in Jackson county, and covering the part of the first named tract bought by said Chapman, was reported by the commissioner of delinquent and forfeited lands for Jackson county in October, 1840, as forfeited to the commonwealth for the failure of the owner to pay the taxes assessed thereon. And on the 14th of the same month, in vacation, the Judge of the Circuit Court of Jackson county made a decree for the sale of the said tract of land by the said commissioner of delinquent and forfeited lands for that county, and said commissioner reported to said court that he had sold said tract of land to Augustine J. Smith on the 23d day of November, 1840, which said sale was confirmed by said court on the 12th of November, 1841, and the commissioner was directed to convey the land by deed to said Smith upon the payment of the deferred installments of purchase money. This was not done until September 16th, 1843, when the deed to Smith was executed. Smith was one of the defendants in this case in the court below. The jury found a verdict for the plaintiff. Upon which the court gave judgment, and the defendant, Smith, carried the case by writ of error to the Court of Appeals of the State. When this suit was brought, the Code of 1849 had abolished John Doe and Richard Roe, and actions of ejectment were prosecuted in the names of the real parties. As the case stood on the record in the Court of Appeals, the Taylor patent under which Chapman, the plaintiff below, but then defendant in error, claimed the land in controversy was the oldest, and his deed for the land in contest was the oldest. But the Boies and Fally tract under which Smith, the plaintiff in error, claimed the land, was first reported as forfeited, and the proceedings for the sale thereof were first commenced in the circuit court of Jackson county, which gave that court priority of jurisdiction of the sale of the land in question. The sale of the land was first made in Jackson county, at which Smith became the purchaser, and was first reported and confirmed. But the date of the forfeiture of either tract does not appear. The Court of Appeals reversed the judgment of the court below, and remanded the case for a new trial. The court will observe that while one of these tracts of land was forfeited for the non-payment of the taxes thereon, the other was forfeited for the failure of the owner to have it entered and charged with

taxes on the books of the assessor, and that the sales of both tracts were made under and in pursuance of the provisions of the Act of 1837, already referred to, by the commissioners of delinquent and forfeited lands provided for by that act. And that the validity of this act was in no way questioned.

*Ushers' heirs v. Pride*, 15 Grattan 190.

I regard this as an important case in connection with the other Virginia cases. And it is the only one of them which distinctly holds the validity of the Act of April 1, 1831, under which the tract of land in controversy in that case was forfeited.

And now commencing at the point I left off in the regular course of the argument, I will close this brief by calling attention to the following cases decided by this Honorable Court, in addition to that of *Armstrong v. Morrell*, already cited, which I respectfully submit dispose of this case adversely to claims of plaintiff *in error* herein, and sustain the laws of Virginia and West Virginia, which he seeks to have declared unconstitutional and void.

*Murray's lessee, et al., vs The Hoboken Land and Improvement Company*, 18th Howard 229, top page of Mr. Justice Miller's edition. This was an action of ejectment for the recovery of a parcel of land, the property of a delinquent revenue officer of the United States, seized and sold by virtue of a distress warrant issued under an act of Congress, in which it was claimed that the distress warrant was not due process of law in cases of that kind. And the Court, speaking through Mr. Justice Curtis, on top page 230 of the case, say:

"That the warrant in question is legal process, is not denied, 'But is it due process of law?'" And the court unanimously held that this distress warrant *was* due process of law, under the act of Congress by virtue of which it was issued.

And further along the Court say:

"To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold.

We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the

land, a summary method for the recovery of debts due the crown, and especially those due from receivers of the revenues.

It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charter* treats of their restraint.

It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to suffice therefor," etc.

The opinion, throughout, is a very able discussion of the question involved in the case, and I earnestly ~~invite~~ the attention of this Honorable Court to its conclusive reasoning.

*Davidson v. New Orleans*, 96 U. S. 97.

This case was decided in 1877 and the opinion in it was delivered by Mr. Justice Miller. And in this opinion the last case cited was approved. It was a tax case, and involved the constitutionality of the law of Louisiana under which the tax in question was assessed and collected. It is a very important case in this connection.

*Kelly v. Pittsburg*, 104, U. S. 78.

This was another tax case and is also an important one. The points decided in it are clearly expressed in the syllabus:

"1. Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes which is established in this country, is, within the meaning of the Constitution, due process of law.

"2. A State has power to determine what portion of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such portions shall be assessed.

"3. A party is not deprived of his property without due process of law by the forced collection of taxes, merely because they, in individual cases, work hardships or impose unequal burdens."

This case was brought into this Honorable Court by a writ of error to a judgment of the Supreme Court of Pennsylvania, and one of the errors in the judgment appealed from assigned by the appellant, was as follows:

"*Second.* The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburg to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by Art. 14, Sect. 1, of the Amendments of the Constitution of the United States."

And this assignment of error was overruled by this Court, and the judgment of the State court appealed from, was affirmed. And in the close of their opinion the court say: "These views have heretofore been announced by this court in the cases we have cited, and in *McMillan v. Anderson*, 95 U. S. 37.

*In Davidson v. New Orleans*, (*supra.*) the whole of this subject was very fully considered, and we think it is decisive of the one before us."

*McMillan v. Anderson*, 95 U. S. 37.

This was another tax case, in which the defendant, a tax collector, under a law of the State of Louisiana, and without any judicial process or formality, seized certain property of the plaintiff, who was delinquent in the payment of his taxes, and was proceeding to sell it under the provisions of that law for the payment of said delinquent taxes, and was enjoined by the plaintiff from doing so. The ground upon which the injunction was obtained was that the act of the legislature authorizing the proceedings, *deprived the plaintiff of his property without due process of law.* The defendant, say the Court, in their opinion in this case, pleaded that the seizure was for taxes due, and that his duty required him to make it. His defense was sustained and judgment was given against the plaintiff and his sureties in his bond for double the amount of the taxes, and for costs. The plaintiff carried the case by appeal to the Supreme Court of the State, where this judgment was affirmed, and the plaintiff brought the case by writ of error to this Honorable Court, where it was again affirmed. Mr. Justice Miller delivering the opinion of the court. And on page 41 of the case the Court say: Looking at the Louisiana statute here assailed—the act of March 14, 1873,— we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all the governments, are necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our constitution, be lawfully done. But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistence to unlawful taxation. We need not go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail *to* refuse *or* pay his license tax (the words *to* and

*or* ought evidently to be transposed here) the collector shall give ten days written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If, at the expiration of this time, the license be not fully paid, the tax-collector may, without judicial formality, proceed to seize and sell, after ten days advertisement, the property of the delinquent, or so much thereof as may be necessary to pay the tax and costs." And further along the Court say: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present at some tribunal when he was assessed. But this is not, and never has been, necessary." The judgment of the State Court was affirmed.

(Before closing allow me to say that I inadvertantly omitted in the proper place, to note the fact that on the eve of our late civil war a second edition of the Code of Virginia, of 1849, was published, called CODE OF VIRGINIA, 1860.

It was prepared and published by the, then, Secretary of the Commonwealth, under an act of the General Assembly, authorizing and requiring him to do so. But it was never acted upon or in any way approved, by any state authority.)

And now, in conclusion, I submit, with perfect confidence, that the judgment of the court below should be affirmed.

JAMES H. FERGUSON,
OF COUNSEL FOR DEFENDANTS,
JAMES A. NIGHBERT AND OTHERS.

No. 157. IN THE

MAR 3 1898
JAMES H. McKENNEY
CLERK

SUPREME COURT

Brief of Ferguson for D. C.

OF THE (on rearg.)

UNITED STATES.

Filed Mar. 3, 1898.

HENRY C. KING, Plaintiff in Error,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK, Defendants in Error.

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October Term, 1897.

No. 157.

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ARGUMENT OF JAMES H. FERGUSON, OF COUNSEL FOR DEFENDANTS IN ERROR.

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CHARLESTON:
THE DONNALLY PUBLISHING CO., PRINTERS.
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**October Term, 1897.**

No. 157.

ARGUMENT OF JAMES H. FERGUSON, OF COUNSEL FOR DEFENDANTS IN ERROR.

*Preliminary Statement.*

This is one of several actions of ejectment brought by Henry C. King, a citizen of the State of New York, plaintiff, against Simon S. Altizer and about 120 others, including the defendants *in error*, citizens of the State of West Virginia, defendants, in the Circuit Court of the United States for the district of West Virginia, sitting at Charleston, in said district.

The plaintiff's declaration was filed at rules held in the clerk's office of said court on the 4th day of March, 1895, as appears by page 1 of the printed record.

On the 8th day of July, 1895, an order was entered by the court removing the case to Parkersburg for trial. Record, page 8.

And on the 16th day of October, 1895, an order was made in the case showing, among other things, that the defendants, M. B. Mullens, Alexander McClintock and John McClintock, "elected to sever in their defense from the other defendants named in the declaration," and entreed their plea of not guilty. And by the same order and another that follows, it appears that the case came on to be tried by a jury, which failed to agree, and the case was continued to the then, next term of the court. Record, pages 8 and 9.

And on the 14th day of January, 1896, the case came on again to be tried by a jury, and was continued from day to day to the 30th day of January, 1896, when the jury returned a verdict as follows:

"We the jury, by direction of the court, find the defendants, M. B. Mullens, Alexander McClintock, and John McClintock, not guilty." Record, pp. 8 to 11 inclusive. And time was given the plaintiff's attorneys until the 27th of February, 1896, to prepare their bills of exceptions to the rulings of the court below in the trial of the cause.

And on the 27th day of February, 1896, the plaintiff's bills of exceptions having been completed and signed by the court, on motion of the defendants, judgment was rendered and entered for them on said verdict of the jury.

The plaintiff took and filed *five* several bills of exceptions, which are found on pages 12 to 32 of the printed record.

The plaintiff obtained a writ of error to said judgment, and the case is here for review, on said writ.

All the evidence given and offered by the plaintiff, in chief, is found in his first bill of exceptions, and all his evidence in rebuttal is found in his fifth bill of exceptions.

His first bill of exceptions is as follows:

"HENRY C. KING,
*versus*
SIMON S. ALTIZER, *et al.*, } Ejectment.

Be it remembered, that upon the trial of this cause, the plaintiff to maintain the issue upon his part, introduced in evidence a certified copy of the grant issued by the commonwealth of Virginia, to Robert Morris, June 23d, 1795, for 500,000 acres of land then lying in the counties of Wythe and Russle, in Virginia, a large por-

tion whereof now lies in West Virginia, in the counties of Mingo, Logan, Wyoming and McDowell, and in no other counties in West Virginia, which said grant is in the following words and figures, to-wit :"

Here follows the said copy of said grant in full, and the bill of exceptions continues as follows :

"That the plaintiff further offered evidence tending to prove that by sundry mesne conveyances and legislative and judicial proceedings, the title of said Robert Morris to the said tract of land, in the year A. D. 1866, became vested in Robert E. Randall, trustee, on June 29th, 1886, in John R Reed, trustee, and through sundry mesne conveyances of the said Reed, trustee, David W. Armstrong, and Jno. V. Le Moyne passed to plaintiff, Henry C. King, December 27th, 1893, and that defendants were in possession of and claiming title to parts of said land within the bounds of said tract and outside the reservation in said grant when this action was brought and at the time of the trial thereof."

And here the plaintiff, for the time being, rested.

And the bill of exceptions continues thus :

"That the defendants, to maintain the issue on their part, offered in evidence to show an outstanding title in the State of West Virginia to said land, by forfeiture, a certificate of the Auditor of said State of West Virginia in the following words and figures, to-wit :

"STATE OF WEST VIRGINIA, }
*Auditor's Office. Charleston.* }

"I, Isaac V. Johnson, Auditor of the State of West Virginia, do hereby certify that neither Robert E. Randall, trustee, nor John R. Reed, trustee, nor John V. LeMoyne, Henry C. King, John Joseph Marie Schmidt Thornfeldt, August Marie Noverre d'Sericourt, Louis Antoine Des Virges de Maupertures, A. D. Maupertures, Emile Dumas, Charles Dumas, nor David W. Armstrong have entered on the land books of Wyoming, McDowell, Logan, Boone, or Mingo counties a tract of five hundred thousand acres of land for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, nor have either of them had said tract of five hundred thousand acres entered upon the land books of either or any of said counties for either or any of said years, nor have they or either of them paid any taxes upon said land for any of said

years, within any of said counties, as appears from the records in my said office.

"I do further certify that said tract of five hundred thousand acres is not entered on the books of the assessor of any of said counties for any of said years.

"I do further certify that no land was entered on the books of the assessor of any of said counties for either of said years in the name of either or any of said parties.

"And I do further certify that none of the persons hereinbefore mentioned was charged on the land books of any of said counties with State tax on the land aforesaid or any part of it for the years aforesaid or any of them.

"In witness whereof I have hereunto set my hand and official seal this 29th day of October, 1895.

"I. V. JOHNSON,

[SEAL.] "*Auditor, State of West Virginia,*"

And plaintiff waived any objection to said certificate on account of the time of filing the same and offering the same in evidence and any want of notice of such filing and the intention to offer the same; but to the introduction of said certificate in evidence plaintiff, by counsel, objected upon the ground that the same is not the best evidence nor any evidence of an outstanding title in said State to said land claimed by plaintiff, or of any forfeiture thereof or of any fact material to the issue in said cause; which objection of plaintiff was overruled by the court and said certificate was admitted and read in evidence; to which ruling of the court the plaintiff, by counsel, then and there excepted, and said exception was saved to him, and he prays that the same may be signed and sealed and made part of the record, which is accordidgiy done.

Printed record, pages 12, 13.

The plaintiff's objections to the introduction of the certificate in evidence, were that it was "not the best evidence nor any evidence of an outstanding title in said State to said land claimed by the plaintiff, or of any forfeiture thereof, or of any fact material to the issue in the cause."

The counsel for the plaintiff, in his brief filed in this case, assigns *twelve* several specifications of error in the judgment of the Circuit Court in this case, which are set out on pages 5 to 8, inclusive, of his brief, and the admission of this certificate in evidence by the

court against the objections of the plaintiff, is the first error so assigned.

The plaintiff's counsel commences his argument in support of said specifications of error, on page 8 of his brief, and on page 9, he says:

"The plaintiff in error contends that said title was not forfeited at the time of his purchase nor since; that documents offered by the defendants to prove forfeiture were incompetent for the purpose, and were improperly admitted in evidence; that they do not prove, nor tend to prove, a divesture or forfeiture of the title; that plaintiff is an innocent purchaser, and that such forfeiture, if existing and proven, could not avail defendants against plaintiff; that a forfeiture cannot be established collaterally, as here attempted, and that the provisions of the State Constitution upon which the defendants and the court below based the claim of forfeiture are utterly invalid and void." No argument is offered here in support of any of the propositions so asserted in the above quotation, and some of them are certainly astonishing. But the first of the documents referred to in the beginning of said quotation, is the certificate of the auditor admitted in evidence as aforesaid.

This certificate, I maintain, was competent, proper and sufficient *prima facie* evidence of all the facts stated in it, and in the absence of any evidence by the plaintiff, contradicting it, the defendants, if the case had stopped there, would have been entitled to a verdict in their favor.

Chapter 130 of the Code of West Virginia of 1868, is the chapter that treats "of evidence," and section *five* of this chapter, on page 615, reads as follows:

"5. A copy of any record or paper in the clerk's office of any court, or in the recorder's office of county or in the office of the Secretary of the State, Treasurer or Auditor, or in the office of the surveyor of lands of any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. The certificate of the Auditor of the fact and time of the return of any real estate as delinquent, or of the sale thereof for taxes, shall be *prima facie* evidence of what is stated in such certificate. And such copy or certificate purporting to be sealed, or signed and sealed, or signed alone, by any such officer, may be admitted as evidence without any proof of the seal or signature or of the official character of the person who signed it.

"The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands, or of their not having been entered on the books of the assessor of the county or couties wherein they were chargeable with taxes, shall, in any suit in relation to such lands, be *prima facie* evidence of what is stated in such certificate, provided it be filed with the papers in said suit and notice thereof be given to the opposite party or to his attorney, at least twenty days before the first day of the term at which it is to be offered in evidence. When the certificate purports to be signed by the auditor, it may be admitted in evidence without proof of his signature."

If the Legislature had made this last named certificate *conclusive*, instead of *prima facie* evidence, only, the question as to its validity as evidence would have been entirely different from what it is now. As it is, this certificate was open to contradiction. And as the plaintiff failed to *attempt* to contradict it, the presumption is that he was unable to do so. And the certificate in question, and the other certificates and copies of records, and papers mentioned in the section, were not made evidence, or *prima facie* evidence, for the first time, by the Code of West Virginia, as will be seen hereafter.

The chapter which treats "of evidence" in the Code of Virginia of 1849, is chapter 176. And this section, *five*, of chapter 130 of the Code of West Virginia, was taken *ver batem* from chapter 176, section 5, of the Code of Virginia, second edition, published by authority of an act of the Legislature of Virginia, passed March, 1860, entitled *An Act providing for publishing a second edition of the Code of Virginia.*

The first and second section of this act read as follows:

"1. Be it enacted by the General Assembly, That the Secretary of the Commonwealth be and he is hereby authorized and directed to prepare a second edition of the Code of Virginia, in which all alterations and amendments made by the General Assembly, subsequent to the first edition, shall be inserted, and all parts thereof which have been repealed shall be omitted, with such notes in each case of repeal, alteration, or amendment, as will show the authority for the change; and there shall be a new, full and complete index to the whole. For the preparation of said edition, the examination of the proof sheets and the said index, the Secretary of the Commonwealth shall be allowed two thousand dollars.

2. As soon as said work shall be completed, he shall advertise

for the publication of ten thousand copies in all respects equal in paper, printing and binding to the first edition, and shall contract for the printing of the same upon the best terms to be had for the Commonwealth, requiring bond and security for the faithful execution of the work, and prescribing in said contract that the copyright of the said edition shall be secured for the Commonwealth."

The preparation of this edition had been commenced two years before the passage of this act by the Secretary of the Commonwealth on his own account and was completed and published in the year 1860, and is usually referred to as "The Code of Virginia of 1860."

And this was not the first time certificates of the character of the one in question had been made evidence by statute of the facts stated in them.

The opinion of the learned counsel of the plaintiff in error is, that the act making this certificate evidence of all the facts stated in it, is of no force or effect for the purpose intended by the legislature, in its enactment. But inasmuch, as all acts of the legislature are *prima facie*, constitutional and valid, as the counsel produces no authority in support of his opinion, I respectfully submit that the act is valid and the certificate is therefore competent evidence of an outstanding title to the land in question, in the State of West Virginia, as held by the trial court. But in addition to the legal presumption in favor of the validity of the statute in question, I refer to the following cases decided by the Court of Appeals of Virginia.

*Taylor, &c. v. Burdett, &c.* XI, Leigh, 334.
*Usher's heirs v. Pride*, 15, Grattan, 190.

The case of Taylor v. Burdett, was an action of ejectment tried in the county of Kanawha in the year 1835. The plaintiff in the action claimed title to the premises in question under a grant from the Commonwealth of Virginia to *Thomas Augustus Taylor* for 3,051 acres, dated the 16th day of June, 1786, and the defendants claimed title to the land in controversy under a grant from said Commonwealth for 300 acres to David Shirkey and Greenberry Samuels, dated December 28, 1830. In the report of the case the evidence of the defendants is first given, and they seem to have proved everything necessary to establish a perfect defense for them in the action.

Pages 334-5 of the case.

By the sylabus of the case it appears that when this case was

tried, there was an act of the General Assembly in force, passed April 1, 1831, which, "declared that in a suit for the recovery of land lying West of the Alleghany, against a person *bona fide* claiming such land under a grant from the Commonwealth issued previous to the act, who has had the land duly entered, and has paid all taxes chargeable upon it, his adversary shall not be allowed to give his grant in evidence, unless he shall show that he too nas had the land duly entered and charged with taxes according to law, and has actually paid the taxes charged and justly chargeable upon it."

And it appears by the report of the case, that after the evidence of the defendant had been given, as aforesaid, the plaintiff produced the said grant to *Thomas Augustus Taylor*, under which he claimed the land. "And in order to be allowed to give said grant in evidence to the jury, he proved that *Thomas O. Taylor*, one of the lessors of the plaintiff, is the only child and the heir-at-law of the said *Thomas Augustus Taylor*, who had died before the institution of this suit; and he produced the following papers, to-wit: A receipt of the 28th of August, 1834, given by *John Adams Smith*, the chief clerk in the Auditor's office, then acting as Auditor, showing that pursuant to the 27th section of an act passed on the 10th of March, 1832, concerning delinquent and forfeited lands, Thomas O. Taylor had paid in advance, for the year 1834, the taxes on several tracts of land, one of which was the said tract of 3,051 acres, and that the payment was credited to the sheriff of the county; at the foot of which receipt it was certified, that the taxes on said lands had been released by law to 1831, inclusive, and that the same had not been returned delinquent to the Auditor's office for the years 1832 and 1833, and were only charged on the commissioner's books of *Kanawha* for the year 1834, in *Thomas O. Taylor's name;* also a certificate of the commissioner of *Kanawha* county, bearing date the 26th of February, 1835, stating that *Thomas O. Taylor* did enter on the commissioner's books certain tracts of lands, one of which was the tract of 3,051 acres, and that he had charged the taxes on said tracts for the years 1832, 1833 and 1835, on his land book for 1835, without charging damages; and that the said tracts were entered on the books in May, 1834, and were so certified by him to the Auditor in the books of that year; also a receipt of the auditor, bearing date the 18th of March, 1835, showing that *Taylor* paid the taxes of 1832, 1833 and 1835, which payment was in advance of the revenue of 1835, and would be passed to the credit of the sheriff; and

likewise the official printed list of the auditor of public accounts, dated the 24th of August, 1831, purporting to be a list of lands and lots returned as delinquent for the non-payment of taxes for the year 1820, and prior thereto, and redeemable on or before the first of January, 1832, by which list it is shown that the land mentioned in said grant to the said *Thomas Augustus Taylor* was returned delinquent for the non-payment of the taxes thereon in the year 1811." And this being all the evidence offered by the plaintiff to allow the introduction of said grant in evidence, the defendants objected to said grant going in evidence to the jury, which objection was sustained by the court, and the grant, as evidence, was rejected, and the plaintiff excepted (pp. 335-6-7 of the case). A *supersedeas* to the judgment entered on said verdict was awarded, and the judgment was unanimously reversed by the Court of Appeals, and the case was remanded for a new trial (p. 341).

And particular attention is called to the opinion of the court as to the certificate of *John Adams Smith*, on page 339 of the case.

Speaking of this certificate the court say:

"On this certificate two questions present themselves.

1. Is this certificate, being that of the clerk and not of the auditor, admissable evidence? This can admit of no doubt. In case of sickness or absence of the auditor, the chief clerk in the auditor's office is required to perform the duties of the office, and the certificate being signed by J. A. Smith as chief clerk and acting auditor, I must presume he was acting by reason of the sickness or absence of his principal.

2. Does this certificate establish the fact that the taxes were released by law? If the evidence is competent, there can be no reasonable doubt of its sufficiency; for the officer whose duty it was to receive the treasurer's receipt for taxes, and to give the landholder his receipt for them, has certified that for 1831, and the years preceding, that the taxes were released," etc. And on page 341 of the case, Judge Tucker, who delivered the opinion of the court, says:

"As to the other question, as I have not a shadow of a doubt of the constitutionality of the law, and as it is not necessary to be decided, I shall not enter upon a consideration of the elaborate argument on the subject. Suffice it to say, that it has not had the effect of shaking the opinion I have always entertained, that how-

ever harsh many of our land laws may seem, it was fully competent to the legislature to pass them."

*Usher's heirs v. Pride*, 15 Grattan, 190.

This was an action of ejectment brought in the county of Wood in 1841, and tried in 1856. After the plaintiffs had given their evidence of title in themselves to the land in question and rested, (page 192 of the case) "The tenant offered in evidence two certificates signed James E. Heath, auditor, dated in January, 1844, and July, 1845, stating the taxes due on the land from 1819 to 1837, both inclusive, and that no payment had been made in redemption of the land since 1818, and certifying that the land had been returned delinquent from the county of Wood for the years specified, in the names of Thomas and Abraham Usher, and was reported to the commissioner of forfeited and delinquent land for Wood county, for sale. To the introduction of this evidence the plaintiff objected; but the court overruled the objection, and he excepted."

And after an instruction by the court as the force of this evidence given by the defendant, to which the plaintiff excepted, the jury returned a verdict for the defendant, upon which the court gave judgment, and to which judgment a *supercedeas* was awarded. And on the hearing of the case by the Court of Appeals, this court, then composed of *five* of the ablest judges who ever sat in that court at the same time, this judgment was unanimously affirmed.

The opinion of the court was delivered by Judge Allen, (page 195) and he begins by saying, "The first question presented in this case, arises on the third bill of exceptions taken by the plaintiff in error at the trial. From that it appears that certain certificates, purporting to be signed by J. E. Heath, Auditor, were permitted to go in as evidence to the jury, without proof of their execution, or of the official character of J. E. Heath, as tending to prove that the tract of one thousand four hundred acres was delinquent for the years and the amount therein set fourth, and that the same had not been paid at the date thereof. The act of April 1, 1831, Sup. R. C. p. 348, s. 7, (Supplement to Revised Code, page 348, section 7,) makes such certificate evidence of the delinquency and forfeitures as against the parties therein named. And the act of March 15, 1838, Sess. Acts p. 16, s. 7, makes it the duty of the Auditor to cause to be made out a list of every tract of land in the counties West of the Alleghany mountains, forfeited to or vested in the Literary fund for the non-payment of taxes charged thereon,

and which shall not have been redeemed; and to transmit such lists to the Commissioner for the sale of delinquent lands. It having been made the duty of the Auditor to make out and furnish said lists and certificates in his official character, his attestation of the certificate in the usual mode of certifying official copies of documents under his control, must be deemed sufficient evidence of the execution of such document, and the official character of the officer, as much so as the attestation of a clerk to an official copy from his office, is deemed and taken as evidence of the execution of the paper and of the character of the officer, in the absence of any suggestion to the contrary. Upon general principles and without reference to any particular statute, the certificate of the Auditor of a fact appearing from the books under his control, and upon whom the law imposes the duty of examining such books and giving a certificate of the fact thereby appearing as a guide to other officers in the performance of duties imposed on them, would be competent as evidence of such fact. Baker v. Preston, Gilm. 335. And there being no particular mode of authentication or seal of office prescribed, the signature of the officer in his official character must prove itself and authenticate the instrument." Here the court refers with approval to the case of *Taylor v. Burdett*, 11 Leigh, 334, herein before referred to.

And the court, on page 196-7, further says:

"By the Code of Virginia, (referring to the first edition of the Code of 1849) ch. 176, s. 4, p. 661, it is enacted that the certificate of the first auditor of the fact and time of the return of any real estate as delinquent, shall be *prima facie* evidence of what is stated in such certificate; and such certificate sealed, or sealed and signed, or signed alone, shall be admitted as evidence without any proof of the seal or signature, or of the official character of the person signing it. The act of March 31, 1851, Sess. Acts, 12, 33, s. 13, extends the provisions to the auditor's certificate of the payment or non-payment at any time of taxes on forfeited or delinquent lands, etc., but does not alter or effect the admissibility of the certificate of the auditor of the fact and time of the return of any real estate as delinquent. That is the character of the certificate here, and the proof of the signature and official character of the officer is dispensed with."

These authorities, I respectfully submit, effectually dispose of the objections of the counsel of the plaintiff *in error*, to the sufficiency of the certificate in question in this case to prove an out-

standing title in the State of West Virginia to the land in question by forfeiture.

The counsel for the plaintiff *in error* has shown a commendable zeal in pursuit of authorities to support his client's case on all the material points involved in it, and it is certainly no fault on his part that he has found none. His objections to the admisability of the certificate of the auditor as competent evidence of the forfeiture of the lands in question, stand alone on his unsupported opinion not only against all the statutes referred to of Virginia and West Virginia, declaring them competent evidence in cases of the character of this case, but of the two decisions of the Court of Appeals of Virginia, above referred to, holding that like certificates of the Auditor of Virginia were proper and sufficient *prima facie* evidence of all the facts stated in them. There was nothing, however, in these certificates in reference to the non-entry of lands on the books of the commissioner of the *revenue* (called in West Virginia the *assessor*) and there was no such question in either case. But in chapter 176 of the Code of Virginia, second edition, published in 1860, as already appears, section *five* of said chapter, p. 722, reads as follows:

"5. A copy of any record or paper in the clerk's office of any court, or in the office of the secretary of the commonwealth, treasurer, register or either auditor, attested by either officer in whose office the same is, may be admitted in evidence in lieu of the original. And the certificate of the auditor of public accounts (the first auditor) of the fact and time of the return of any real estate as delinquent, or of the sale thereof for taxes, shall be *prima facie* evidence of what is stated in such certificate. Any such copy or certificate purporting to be sealed, or sealed and signed, or signed alone, by any such officer, may be admitted as evidence without any proof of the seal or signature, or of the official character of the person whose name is signed to it. The certificate of the auditor of public accounts of the payment or non-payment at any time, of taxes on forfeited or delinquent lands, or of their not having been entered on the books of the commissioner of the revenue for the county or counties wherein the same were chargeable with taxes, shall, in any suit in relation to such lands be *prima facie* of what is stated in such certificates, provided it be filed with the papers of said suit at least twenty days before the first day of the term at which it is to be offered as evidence. When the certificate purports to be signed by the first auditor, it may be

admitted as evidence, without proof of his signature." Sec. 5 of chapter 130 of the Code of West Virginia, with the necessary verbal charges, is an exact copy of this.

And I respectfully submit, that if the General Assembly of Virginia had the power to pass acts of this character, it goes without saying that the Legislature of West Virginia has the same power.

The counsel for the plaintiff in error devotes nearly three whole pages of his brief 13, 14 and 15, conjuring up all sorts of imaginary obstructions in the way of his client and other *innocent* victims like him, which *possibly might* be thrown in his way by a rascally assessor to prevent him from ever entering the land of which he claims to be the owner, on his land books; things which never did and never will happen, and never *can* happen if he has a competent and faithful attorney to look after his interest in the matter.

The plaintiff's 2d, 3d and 4th bills of exceptions contain the balance of the evidence given to the jury by the defendants, and whether it was competent or incompetent, is a matter of no sort of consequence. It was simply cumulative of what had already been sufficiently proved to entitle the defendants to a verdict. If it was competent, which I maintain it was, it did not help their defence, and if it was incompetent, it did not injure the plaintiff. *He was beaten without it.* And therefore I do not propose to discuss it.

The plaintiff's *fifth* bill of exceptions contains all of his evidence given in rebuttal, and is as follows:

"HENRY C. KING,
*vs.*
SIMON S. ALTIZER, *et. al.* } Ejectment.

Be it remembered that on the trial of this cause, and after the matters stated in the plaintiff's first, second, third and fourth bills of exceptions, and after the defendants had rested their case, the plaintiff, to prove that no forfeiture of the land, or outstanding title thereto, existed or was claimed by the State of West Virginia, and that there was no record of any forfeiture of said land where the same would be found if any such forfeiture did exist, introduced and read in evidence a certificate of the auditor of the State of West Virginia, dated October 30th, 1895; which certificate is in words and figures following, to-wit:

STATE OF WEST VIRGINIA:

AUDITOR'S OFFICE, CHARLESTON.

I, Isaac V. Johnson, auditor of the State of W. Va., do certify that I have carefully examined the record books of forfeited lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, in said State, from and including the year 1883 to this date (1895) and there does not appear on said record books a tract of 500,000 acres of land or any part thereof or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, Jno. R. Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of forfeited lands of this office for either or any of said years in the name of either or any of the said parties.

I do further certify that I have carefully examined the record books of delinquent lands returned and kept by me in said office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, in said State, from and including the year 1883 to this date (1895) and there does not appear on said record book a tract of 500,000 acres of land or any part thereof or any other tract delinquent for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee; A. D. Maupertures, John R. Reed, John R. Reed, trustee; John V. Le Moyne, David W. Armstrong, or Henry C. King.

I further certify that there are no lands from any of said counties entered on the record of delinquent lands of this office for either or any of said years in the name of either or any of said parties.

Given under my hand and official seal this 30th day of October, 1895. *

I. V. JOHNSON,
*Auditor of West Virginia.*

That the plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claims title, and proved further that plaintiff was a purchaser of said tract of land for valuable consideration and with-

out knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia or of any of the facts set out in the Auditor's certificate shown and referred to in plaintiff's first bill of exceptions, except such notice as the land books and records duly kept disclosed.

That thereupon plaintiff rested his case and the defendant did the like; whereupon, at the instance of the defendants, the court instructed the jury as follows:

"The jury are instructed that the title to the land claimed by the plaintiff, granted to one Robert Morris by the Commonwealth of Virginia, by patent dated June 23d, 1795, was (prior to the date of the deed made by John V. Le Moyne to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To which instruction plaintiff, by his counsel, objected upon the ground that said provisions of the constitution of the State of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to wit, article XIV, sec. 1, of the amendments thereto, and other paramount and controlling provisions of said State constitution, to wit, Art. III, sec. 4, 5, 9, 10, 29, art V., sec. 1, of the said constitution of the State of West Virginia, and upon the further ground that if there were a forfeiture of the said land to said State and an outstanding title thereto in said State it could not be set up against plaintiff in this action, who is a purchaser for value without knowledge or notice of such forfeiture or of outstanding title; but the court overruled plaintiff's said objection and gave said instruction; to which ruling of the court in giving said instruction plaintiff, by his counsel, upon the grounds aforesaid, excepted, which is his second exception, and asked that said exception be saved to him and signed, sealed, and made a part of the record; and thereupon the jury, in accordance with said instruccion of the court, proceeded to render a verdict, which is in the following words and figures, to wit:

"We, the jury, by direction of the court, find the defendants M. B. Mullins, Alexander McClintock, and John McClintock not guilty.

A. J. SMITH, *Foreman.*"

And the court thereupon proceeded to enter judgment upon the said verdict; which judgment is in the following words and figures, to-wit:

"This day came again the parties, by their counsel, and thereupon the defendants, by their counsel, moved the court to render judgment upon the verdict of the jury rendered on the 30th day of January, 1896.

"It is therefore considered by the court that the plaintiff take nothing by this bill, but, for his false clamour, be in mercy, &c., and that the defendants go thereof without day and recover of the said plaintiff their costs by them about their defense in this behalf expended."

To which rulings and action of the court the plaintiff, by his counsel, objected and excepted, and asked that said objections and exceptions be saved to him and signed, sealed and made part of the record in said cause, all of which is accordingly done."

This certificate read in evidence by the plaintiff to the jury proves nothing for him, inasmuch as he gave no evidence to the jury in support of that certificate. It is true that there was no record in the office of the auditor, in the sense in which that record is required to be kept. Section Six of Article XIII of the present constitution of West Virginia, and section 39 of chapter 31 of the Code of West Virginia, THIRD EDITION, page 225, passed for the purpose of carrying that article of the constitution into effect, read as follows:

"It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes thereon, and to pay the same. When for any five successive years, after the year one thousand eight hundred and sixty-nine, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such land books with a State tax on said land, then by operation of law, and without any proceedings therefor, the land shall be forfeited and the title thereto vested in the State. But if for any one or more of such five years the owner shall have been charged with State taxes on any part of the land, such part shall not be forfeited for such cause."

This is followed by an exception in favor of infants, married women and insane persons. But this exception is limited to 20 years from the time of the forfeiture. And said last named section further provides as follows: "A record of all real estate so for-

feited which shall come to the knowledge of the Auditor shall be kept in his office, in which shall be shown the name of some former owner, or supposed owner, the quantity or supposed quantity, and local or other description of the real estate; for what years the owner was not charged with the taxes, and when the real estate became forfeited, such record shall be *prima facie* evidence that the owner was not for such years charged with the taxes on such real estate and that he did not cause it to be entered and charged with such taxes as aforesaid, and that the real estate was forfeited and vested in the State at the time specified. In order to enable the auditor to make such record, it shall be the duty of the clerk of the county court of each county in which such real estate ought to have been entered and charged with taxes as aforesaid, upon discovering any such failure, to certify to the auditor all the facts in relation thereto."

And by reference to the said *fifth* bill of exceptions it will be seen that the plaintiff neither proved, nor offered evidence tending to prove, that the failure of the said plaintiff to enter the tract of land in question in whole or in part on the land books of any of the said counties in which it, or any part of it, was situate and chargeable with taxes for all or any of the years mentioned in the said certificate of the auditor read in evidence by the defendants, or by the said certificate read in evidence by himself, ever came, in any way, to the knowledge of the auditor, or was ever discovered by the clerk of the county court of either of the counties in which the said tract of land, or any part of it, was situate and chargeable with taxes. The auditor's residence and place of business is during his term of office, at the Capital of the State, and, therefore, it was impossible for him to make and keep the record mentioned in said section, in the absence of the certificates of the clerks of the county courts of the several counties in which the said land is chargeable with taxes. And in this connection the attention of this Honorable Court is called to section thirty-two of chapter twenty-nine of the Code of West Virginia, 3rd edition, p. 172, a part of which section reads as follows:

"And every tract of land of more than one thousand acres lying in two or more counties, shall, for the purposes of taxation, be entered and charged with State, State school, county and district of the several counties in which any part of it is, to the extent, as near as may be, that the same lies in such district." This was more than the gentlemen claiming these large surveys, and living

in other states could submit to, and therefore they refused to enter them, and have them charged with taxes at all. This matter will be referred to again in another connection.

The counsel for the plaintiff *in error* fails to follow the order of his specifications of error in his brief, and I will, necessarily, have to follow his example. On pages 9 and 10 of his brief he inserts the whole of Article XIII of the present Constitution of West Virginia. And on page 11 he inserts a scurrilous charge, which should have occupied no place in his brief, against the members of the convention who framed that Constitution. This convention sat twenty-five years ago, when the counsel was, according to my information, in his teens, and being then in his native State, Vermont, he could have had no knowledge of the character and standing of the members of that convention. And his advent into West Virginia dates from about the year 1894. And I can hardly suppose that he originated this libel upon the members of this convention, but that he derived his information from some unscrupulous citizen of West Virginia, probably a lawyer, for we have, I am sorry to say a *few* of that sort, in our State. And while he has gone out of the record to retail this charge, I will follow him out of the record to say, that while he was in Vermont, I was on the ground, in the city of Charleston, quite often while that convention was in session, and I *know* that there is not a word of truth in the charge. The members of the committee of the convention who framed Article XIII of this Constitution were mainly the leading lawyers of the State, and no article of that Constitution received more careful and patient consideration than Article XIII. It was not the work of *schemers and sneaks*, but of gentlemen of character and standing. And was adopted after mature consideration by a full convention, and afterwards approved by the voters of the State of West Virginia, at the polls.

And the counsel, after having worked himself up into a white heat, declares in his wrath, that "this forfeiture provision" of the constitution is "in irreconcilable conflict with the letter and spirit of many preceding provisions, at war with the principles of civil government, and for rapacity, despotism and injustice unparalleled in the history of legislation."

And why! Simply because the authorities and people of West Virginia refuse to quietly fold their arms and permit Mr. Henry Clay King, a citizen of the State of New York, to come into West Virginia *posing* as an innocent purchaser of 500,000 acres of land, the property in part of the citizens of the State, and in part of

the State, without the payment of taxes to the amount of many thousands of dollars due thereon, as those under whom he claims have done before him.

But the counsel has made a remarkable discovery. He has discovered that this *rapacious*, *despotic*, *unjust* and unparalleled provision of the constitution is *harmless* after all; that it is ungrammatical, and that the two sentences of section *six* of Article XIII, which were supposed to work the forfeiture, have no connection with each other. And commencing on page 11 of his brief he says:

"This forfeiture provision seems to be almost universally misapprehended and the forfeiture misascribed. Out of the desire apparently of those who defend it, to find some cause for the confiscation, and to make the penalty for some delinquency of the owner, the alleged forfeiture is commonly said to be '*because* the owner has *failed to have* his land *entered* on the land books,' or briefly, 'for omission,' for 'non-entry,' and less often '*for failure* of the owner to *have* himself charged with taxes.'

There is nothing in the Constitution to justify such expressions. The supposed forfeiture is not because the land is not entered on the land books, or because of anything the owner has done or failed to do. Mark the language: 'When for any five successive years *since* the year 1869.' But this is not the language of the passage he attempts to quote. The word *since* is not in it; the word underscored is *after* in the Constitution. And the substitution of *since* for *after* in the Constitution might make an important difference in its construction, as it seems to me. And now, mark the language of the Constitution: 'When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, *shall not have been charged* on such books with State taxes on said land, then by operation hereof the land shall be forfeited,' &c. It is 'when * * he shall not have been charged,' and not *because* the land is not *entered* on the land books."

"There is a provision that "it shall be the duty of every owner of land to have it entered on the land books *of the county in which it or a part of it is situated and to cause himself to be charged with the taxes thereon and pay the same*," but what of it? That provision is not coupled in law or grammatical sense with anything preceding or following, and it might as well be in a different article. No consequence or effect of any sort is, in terms, attached to a failure to perform that duty, *and penalties are not to be raised by*

*inference.*" And again, he says: "The provision for forfeiting the land 'when the owner shall not have been charged,' makes no reference to, and has no grammatical or other connection with, the provision prescribing the duty of the land owner, and is in no manner whatever dependent upon it, for meaning or legal effect or validity. Strike out the 'duty' provision and it would not change or effect the meaning or force of a single other syllable in the Article. The forfeiture is as purely a causeless and arbitrary capture of property as was ever made by a pirate upon the high seas. When the pirate falls afoul of the merchantman, the latter is by operation thereof forfeited to and vested in the pirate."

This is severe language to be applied to the legislature and courts of Virginia and West Virginia, and to the members of the constitutional convention of West Virginia who framed her constitution, and to the people who by their votes adopted that constitution. But in view of the fact that it is all in behalf of an *innocent purchaser* of the 500,000 acres of land in question who has a *constitutional* objection to paying the taxes due on the land, we can all stand it.

And now a few words as to the gentleman's grammar. It is with some degree of hesitation that I venture to take issue with him in a matter of grammar. For while he is a *college* graduate, the institution from which I graduated was the old Virginia old field log school house, built after the rudest pattern of the log cabins of the pioneer settlers of the country, in which neither Hebrew, Greek, Latin nor English were taught. But, as it seems to me, in my *ignorance* of grammar, there *is* some connection between the two sentences of section *six* of article XIII, which *we* think *does* create the forfeiture of the land in question. The first sentence is *plain, positive* and *mandatory.* "It *shall* be the duty of *every owner of land* to have it entered on the *land books* of the county in which it, or a part of it, is situated, and to *cause himself* to be *charged* with the *taxes thereon*, and *pay the same.*" So reads this first sentence, (italics mine). This sentence prescribes the *duty* of the land owner in plain and unambiguous terms. And now as to the next sentence.

"When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on *such books*," (what books? Plainly the *land books* mentioned in the first sentence, no other books being mentioned) "with State tax on said land," (what land? Plainly the land mentioned in the preceding sentence which prescribed

the *duty* of the owner in the premises) "then by operation hereof the land shall be forfeited and the title thereto vest in the State." And no hypercritical construction of these two sentences will, I confidently submit, be allowed to fritter them away.

The plaintiff's *fifth* bill of exceptions (see page 14 of this brief) says, "that the plaintiff offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883, had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claims title, and proved further that plaintiff was a purchaser of said tract of land for a valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto, in the State of West Virginia, or of any of the facts set out in the auditor's certificate shown and referred to in plaintiff's first bill of exceptions, except such notice as the land books and records duly kept disclosed."

This evidence was the record of the case of *McClure v. Morperture*, 29 W. Va., 633, as will fully appear further on. But before calling attention to the facts appearing in that case, I propose to notice some of the things asserted by the counsel of the plaintiff in error on pages 13 to 20 of his brief filed in this case. By reference to these pages, it will be seen that my brother Stiles is a gentleman of a vivid imagination. He imagines all sorts of things that *might* happen to prevent his client from getting the land to which he has no title, on the land books—things which never *did*, never *will* and never *can* happen if his client always has an attorney competent and faithful to look after his interest. He imagines that the clerks, the assessors and the courts *might* all conspire to keep the land claimed by Mr. King off the land books, and deprive him of the pleasure of paying taxes on the 500,000 acres of land in question. And then, if the time should ever come when Mr. King had swept all these obstructions out of his way, it has occurred to my brother that inasmuch as the constitution and laws of the State forfeit lands only for the failure of the owner to have them entered and charged with *State* taxes on the land books, the legislature of West Virginia *might* conclude not to lay any taxes on lands in the State for five successive years, and in that way effectually checkmate Mr. King in his laudable efforts to get this tract of land on the land books so that he could pay taxes on it.

And then, on page 15 of his brief, he says in large capitals:

"PLAINTIFF'S LAND ENTERED ON LAND BOOKS."

He says: "All taxes charged and chargeable on the land, up to and including the year 1883, had been paid by him, (Robert E. Randall, trustee). This is undisputed and is shown by defendant's evidence as well as plaintiff's." In this the counsel is mistaken. His statement is disputed, and there is nothing in the defendant's evidence which even tends to show it. Then he says: "He (Randall, trustee) had then discharged the duty of having the land entered on the land books and having it and himself charged with the taxes thereon and paying the same. He paid the taxes as long as they were charged, if, as defendants urge, none were charged after 1883. If they had been charged, they would have been paid or the land would have been sold. If he stopped paying taxes after the *State authorities stopped charging them*, it does not seem remarkable."

Whose fault was it that no taxes were charged upon the land after 1883. This question will be answered in due time, and in the proper place.

The case of *McClure v. Morperture*, 29 West Va., 633, is conceded by the counsel of the plaintiff *in error* to be the case in which Randall made his so-called redemption of the land in question in 1883. (See pages 125–6–7–8, appendix to his brief.) On the hearing of the case in the Court of Appeals I appeared with counsel of the plaintiff *in error*. That counsel had no expectation of reversing the decree for want of jurisdiction in the Court to do so, but we accomplished the object for which the appeal was taken.

And now, as that case is fairly before this Honorable Court I propose to avail myself of the opportunity of calling attention to the statement of the case by Judge Green, commencing on page 633, and ending on page 638 of the case. The material facts contained in this statement, to which I desire to call particular attention, are the following:

1. That on the 21st day of April, 1881, William B. McClure, commissioner of school lands of Wyoming county, filed his petition in the circuit court of that county to subject to sale for the benefit of the school fund, that portion of a tract of 500,000 acres of land lying in Wyoming county, 300,000 acres of which were forfeited in the name of A. D. Morperture, for the non-payment of the taxes for the years 1874, 1875 and 1877; and 200,000 acres, the residue thereof, forfeited in the name of R. E. Randall, (not R. E. Randall, trustee) for the non-payment of taxes thereon for

the year 1870. And that both of said parcels of said tract were sold for the non-payment of the taxes thereon, and purchased by the State of West Virginia, and never redeemed from that sale.

2. That there were four other claimants of said land beside the said Morperture and Randall, viz: Black, Suydam, Reid and the Pittsburg National Bank of Commerce.

3. That the source of the title set up by all these claimants was a patent obtained many years before by Robert Morris for said 500,000 acres of land, and that the estimated quantity of said tract lying in Wyoming county, was 365,000 acres. All of these claimants were made parties to the proceeding, and all of them being non-residents of West Virginia, an order of publication was awarded against them.

4. At the November term of said court, 1881, the said Robert E. Randall appeared, and represented himself as the trustee of the heirs of the said A. D. Morperture, and claiming as such trustee to have an interest in the land, and a title thereto superior to all others. He admitted the forfeiture of the land and asked in his petition then filed to be permitted to redeem it from the forfeiture. And time was given him till the then next term of the court to redeem the land as requested. The cause was then referred to a commissioner to ascertain and report "the amount of taxes, damages and interest and cost of this proceeding."

The commissioner reported that the amount so due from 1839 to 1860, at 12 *per cent.*, amounted to $191,141.37, and at 6 *per cent.* to $145,906.34. He also reported that in his "judgment the proper amount should be at 12 *per cent.* from the formation of the State and charging only when the land tax was probably not paid," and that the taxes charged in this way on the 200,000 acres would be $77,254.72, and on the 300,000 acres, $44,892.23. This report was excepted to by Randall. And on April 11th, 1882, The Pittsburg National Bank of Commerce filed its petition "asking to redeem the 300,000 acres if a forfeiture had occurred, but protesting "that no forfeiture of the land or of any part of it, had occurred," etc. (Page 365 of the case).

On July 11th, 1882, Randall again appeared in court and was permitted to file an answer to the petition of the Pittsburgh National Bank of Commerce, and also to amend his own petition. In his answer and amended petition he abandoned the claim first set up by him that he was the trustee of the heirs of A. D. Morperture, and in this amended petition, he claimed the land as trus-

tee for the creditors of James Swann. And here Judge Green says; "He traces his title to an act of the Legislature in 1838, vesting title to this land in John Peter Dumas as trustee of the creditors of James Swann, and exhibits his substitution as trustee." This act of 1838 will again be referred to. The same decree that permitted Randall to change his ground, throw off his allegiance to the heirs of Morperture, if his first claim was true, and asking to be allowed to redeem the land as trustee for the creditors of James Swann, referred the case to a commissioner "to report on the various matters designed to enable the court to dispose of the case but unnecessary to be stated." (So reads the statement of the case, page 636). A statement of what the commissioner reported follows on the same page, and contains nothing showing the amount of taxes, etc., due on the land. And Randall excepted to that part of it which "undertook to state the quantity of land in each county and State," which exception, and his exceptions to the report of the first commissioner in the case, stating the amount of taxes due on the 300,000 acres of land by A. D. Morperture, and by himself, but not as trustee, on the 200,000 acres, in whose names it had been entered and charged with taxes and sold, and purchased by the State of West Virginia, as aforesaid. So far as the record of the case shows, the tract of land in question, either in whole or in part, had never been entered and charged with taxes in the name of Robert E. Randall, trustee, on the land books of any county. And only 200,000 acres of the tract had ever been entered and charged with taxes in his name for the year 1870, and for that year the land had been returned delinquent and sold, as aforesaid.

The petition of the commissioner of school lands prayed for the sale of the 300,000 acres forfeited in the name of A. D. Morperture, and for the sale of the 200,000 acres forfeited in the name of *Robert E. Randall*. The exceptions to both reports made in the cause, that of the first commissioner stating the amount of taxes, interest, etc., due and unpaid on the land, and that of the last named commissioner in stating the quantity of the land in each county and State, were sustained, (p. 636 of the case).

No change in, or amendment to the petition of the Commissioner of School Lands was made. And then, without a particle of evidence that the 500,000 acres of land in question, or any part of it, had ever been entered and charged with taxes in the name of Robert E. Randall, trustee, for the creditors of James Swann or simply trustee, or of the amount of taxes due and unpaid upon

the whote tract, or of either of the parcels thereof as aforesaid, or of the quantity of the land in West Virginia, or in any county thereof. The exceptions to both of the reports as to both of these matters having been sustained, the case came on to be heard, and a final decree was rendered and entered therein, as follows:

And now this cause came on to be heard upon the report and supplemental report and petition filed herein, and exhibited therewith, (this report and supplemental report were reports of the commissioner of school lands which he was required to make as the basis of his petition for the sale of the land), upon the amended petition of R. E. Randall in the nature of an answer to the petition of the Pittsburg National Bank of Commerce, and the exhibits filed with each, and upon the other papers and evidence in the cause, and was argued by counsel. Upon consideration of all of which the court is of opinion that at the time of the forfeiture of the land mentioned in the cause, or any part thereof, to the State for the non-payment of the taxes for the failure to have the same placed upon the land books, or any part thereof, and at the time the title thereto, or to any part thereof, vested in the State for any of said causes. Robert E. Randall, trustee of the Swan estate, had the title thereto superior to all other claimants and now has the right either as creditor of A. D. Morperture or those claiming under him, or as owner of the same, or of a portion of said tract, and as owner of the whole or part thereof, and as creditor of A. D. Morperture, having a lien thereon, to redeem and pay the taxes on the whole of said tract of 500,000 acres originally granted to Robert Morris, assignee of Wilson Cary Nicholas, on the 23d day of June, 1795, and that the title of said Randall, trustee, as aforesaid, at the time of said forfeiture, was superior to that of the Pittsburg National Bank of Commerce or any other claimant of said land: and it being agreed and admitted in open court that the whole amount of taxes, costs and interest due upon said tract is $8,000.00, and the commissioner of school lands aforesaid agreeing to and accepting that amount in payment in full of all taxes, costs, interest and damages up to and including the year 1883. And it further appearing that the said Robert E. Randall, trustee as aforesaid, has paid to the plaintiff this day in open court all taxes, damages, costs and interest heretofore unpaid thereon, and amounting to the sum of $8,000, it is therefore, adjudged, ordered and decreed that the payment aforesaid operate as a release and exoneration of all former taxes on said land, and that no sale thereof shall be made. It is further ordered that the plaintiff pay

said sum of $8,000.00 into the treasury of the State, less ten per cent. commission thereon, which is hereby allowed him, after paying the costs of this proceeding, and that he make report thereof as required by law. But nothing in this decree shall in anywise affect or impair the rights of Junior claimants or occupants within the boundaries of said tract of land, and whose title or claims are protected by the constitution and laws of the State. And it is ordered that the clerk of this court certify a copy of this order to the auditor, and also certify *under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment districts for taxation.*"

The italics are mine, as I wish to call special attention to this part of the decree, and to what the counsel of the plaintiff *in error* has to say about it on pages 127–128 of his appendix to his brief. He says: "The final order of redemption set out in full in the statement contains this provision: 'And it is ordered that the clerk certify a copy of the order to the auditor and also certify, under the direction of said Randall or his attorney a copy of this order to the assessor of the district for taxation.'" But the order does not say *district*, but *districts*, and the difference in view of what follows, is material. The counsel then says: "There was a special direction to the clerk to certify the order to the auditor without regard to Randall or his attorney, and the direction to certify to the assessor is also mandatory, Randall, or his attorney, supervising the matter." This was indeed, a very singular mandatory order, when by its very term, the clerk could not act in the matter at all, until he was directed to do so by Randall or his attorney, and neither of them ever gave him any directions in the matter, or if he did there is no evidence of it in the case.

And on pages 127—8 of the Appendix to his brief, he says: "By reference to sections 15, 17, 23, chapter XXIX, of the Code, given at pages 17 and 18 of this brief, it will be seen that it was the duty of the clerk to certify the order to the auditor and to the clerk of the county court, who makes out the land books independently of this order and for the auditor to certify the redemption to the clerk of the county court, and the clerk duly to enter the land on the land books in the name of the redemptioner for taxation. Why didn't these officers do these things, if they did not? No fault could be charged to the attorney of Randall, now the attorney of the defendants, except as to the copy to be sent to the assessor, and that would not relieve the clerk.

If the copy was sent to the Auditor, it would get to the assessor throuh him and the clerk of the county court. If any fault is charged to the attorney, I refer to the supposed case at page 68 hereof."

Well, I have read page 68 of his brief, and find that his *supposed* case is but one of the figments of the brain, found now and then in his brief from near the beginning thereof to the end of the Appendix. I have also turned to Sections 15, 17, 23, of chapter 29 of the Code, and in them, I find nothing of importance. Sections 15 and 17 have nothing bearing at all upon any question in this case. And Section 23 makes no change in the duty of the clerk, under the decree, to certify a copy thereof to the assessor of the proper assessment districts, *under the direction of said Randall or his attorney.* Randall, himself, had a duty to perform in order to get the land on the land books, after this decree reached the assessor, which is found in Section 32 of Chapter 29 of the Code of West Virginia, 3rd edition, p. 172. This section, among other things, provides as follows:

"Every tract of land of more than one thousand acres lying in two or more counties, shall, for the purpose of taxation, be entered and charged with State, State school, county and district taxes in each ~~registered~~ district of the several counties in which any part of it is, to the extent, as near as may be, that the same lies in such district." And this tract of land lying, as it did, in the three counties of Wyoming, Logan and McDowell, had to be entered on the land books of each of said counties, and in each magisterial district of each of said counties, to the extent, as near as *might* be, in each of said districts. And this was doubtless, the reason, if he had any reason, other than the request of Randall himself, why the Judge of the court directed the copy of the decree to be certified *under the direction of Randall or his attorney* to the assessor. But it is more than probable that these italicised words were inserted in the decree by the request of Randall himself, who seems to have had everything done about as he wanted it. The land could not have been gotton on the land books of every magisterial district in the three counties of Wyoming, Logan and McDowell, without Randall's personal assistance, or that of some person having sufficient knowledge of the boundary lines of the tract, and of the magisterial districts in which it was situated, without a very heavy expense, otherwise than by an agreed estimation of the quantity of said tract in each of said districts, and the value of the land in each district agreed on, or assessed by the assessor; all

of which, when done, the assessor was required by law, as we shall see hereafter, to certify to the clerks of the county courts of said counties to enable them to make up the land books of the county for the year in which this assessment is made. And Randall was in no hurry to have this done, in as much as the longer it was delayed, the longer he could escape the payment of taxes.

During the twenty years of Mr. Randall's trusteeship, he never distinguished himself as a *tax payer*, and if, during all of these years, he ever paid a single cent of taxes on the 500,000 acres of land in question, or on any part of it, except the $8,000.00 he paid in 1883, there is not a particle of evidence in this case, or in the case in which he paid the $8,000.00 to show it. There is some evidence in the case in which he paid the $8,000.00 as aforesaid, showing that a small amount of taxes were paid on the 300,000 acres, part of the 500,000 acres by another claimant of that part, who claimed it adversely to Randall, but not a cent by him, even on the 200,000 acres of said tract charged to him for a single year.

But as a *tax dodger*, Mr. Randall was a success. By reference to pages 25, 26, of the printed record (plaintiff's bill of exceptions No. 3) it will be seen, that in the list of lands reported to the Circuit Court of Logan county in August, 1891, by the Commissioner of School Lands, there were four several tracts of land reported as forfeited to the State of West Virginia, in the name of Robert E. Randall, trustee, for his failure to have them entered on the land books of Logan county and charged with taxes in his name for five successive years after the year 1869 and previous to 1891 as follows:

A tract of 100,000 acres, granted by the Commonwealth of Virginia to Wm. McCleary, January 21, 1796.

A tract of 174,000 acres granted by same to Benjamin Grayson, on December 24, 1795.

A tract of 101,212½ acres granted by same to William McCleary, December 9, 1795, and a tract of 500,000 acres granted by same to Robert Morris, assignee of Wilson (misprinted William) Cary Nicholas, June 23, 1795.

And here we have Robert E. Randall figuring as a *tax dodger*, to the extent of 875,212½ acres, by keeping this vast body of land off the land books so that it could not be charged with taxes.

But, I deem it proper and legitimate to say, that Mr. Randall was not so much to blame in the matter as would seem, without an explanation. He had no money of the *alleged* creditors of James Swann to pay taxes with. And it was only when he could

find a person willing to take the risk of buying some of the land of which he was trustee, and paying the cash for it, that he could pay any taxes, if he had a mind to pay them at all. And this was how he raised the money to pay the $8,000.00 taxes, &c., in 1883. He had negotiated a sale of 15,000 acres of the land at one dollar per acre, and the purchasers were on the ground with the cash, ready to pay, as soon as the redemption was assured. And so they paid, and Randall paid, and had $7,000.00 cash left. What he did with that we don't know, but we do know that he never paid taxes on the land in question with it.

These facts are notorious in and around the town and country where the courts of Wyoming county were and still are held, and where the records of the county are kept.

On the trial of this cause in the court below, the court, at the instance of the defendants, instructed the jury as follows:

"The jury are instructed that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Va. by patent dated June 23rd, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Va., forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

The plaintiff, by his counsel, objected and excepted to this instruction upon the ground:

"The said provisions of the Constitution of the State of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to wit, article XIV, sec. 1, of the amendments thereto, and other paramount and controlling provisions of said State constitution, to-wit, Art. III, sec. 4, 5, 9, 10, 29, art. V., sec. 1, of the said constitution of the State of West Virginia, and upon the further ground that if there were a forfeiture of the said land to said State and an outstanding title thereto in said State, it could not be set up against plaintiff in this action, who is a purchaser for value without knowledge or notice of such forfeiture or of outstanding title; but the court overruled plaintiff's said objection and gave said instruction; to which ruling of the court in giving said instruction plaintiff, by his counsel, upon the grouds aforesaid, excepted."

There are but two points of objection to this instruction given

by the court to the jury, which I propose to notice, viz: That the provisions of the Constitution of West Virginia for the forfeiture of lands are repugnant to and in conflict with the Constitution of the United States, to-wit: article XIV, sec. 1, of amendments thereto; and to other paramount and controlling provisions of said State Constitution, to-wit: Art. III, sec. 4, 5, 9, 10, &c. The objection as to section 10, of Article III, of the State Constitution is all I propose to consider, and I will dispose of this first.

Section 10 of this article now reads as follows:

"10. No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

How the copulative conjunction *and* came to be substituted for the disjunctive *or*, no member of the constitutional convention who assisted in framing our present constitution has ever been able to tell. The change was not discovered until quite awhile after the constitution had been published, but when all the members of that convention were living, and the only way that any of them undertook to account for it, was by supposing it to be merely a *clerical* error. This change and its effect has been twice considered by our Supreme Court of Appeals in the cases of *Keystone Bridge Co. vs. Summers et al.*, 13 West Va., 496, and *Jelly vs. Dils and Smith*, 27 West Virginia, 267, 274. The Court in the last named case, speaking through Judge Green, say:

"The only other provision of our Constitution which it is claimed they (the ordinances of the town of Moundsville) violate, is Sec. 10 of our bill of rights, which is: "No person shall be deprived of life, liberty or property, without due process of law and the judgment of his peers." What is meant by *due process of law?* Justice Edwards said, in *Waterrelt v. Gregg*, 12 N. Y. 209: "*Due process of law* undoubtedly means in due course of legal proceedings, according to the rules and forms, which have been established for the protection of private rights." And by *judgment of his peers* is meant a trial by jury. In the constitution of many of the States, instead of the phrase due process of law, we find the phrase *the law of the land*, which it is universally agreed, means the same thing; and in a few of the States the phrase *due course of law* is used instead of *due process of law*, which it is also agreed means the same thing. The phrase *judgment of his peers* is omitted in the provisions of the constitution of many of the States. But its omission, as we shall presently see, does not alter the meaning of the provis-

ion. In all the Constitutions which I have examined, where both these phrases *due process of law* and *judgment of his peers* are used, these are connected together by the disjunction, *or*, so that this provision of the Constitution reads: "No person shall be deprived of life, liberty or property without due process of law or the judgment of his peers." Why in our Constitution the copulative *and* was used instead of the disjunctive *or*, it is difficult to conceive, unless it was a mere clerical error, which I suspect to be true. It obviously did not mean that no person shall be deprived of life, liberty or property without a trial by jury; for there never has been a time in this State or in any other State, or in England, in which it was held indispensable that to deprive a man of his life, liberty or property, he should in all cases have a trial by jury. And in truth it would be utterly impracticable to carry on any government, if this construction was placed on this provision of the Constitution, and it was habitually acted upon. Every day men are, and have been for hundreds of years past, deprived of their property by decree in chancery. In fact, men are much oftener, and to a much greater extend, deprived of their property by decrees of court than by the verdict of a jury. Men, too, are habitually dsprived of their property by distress for taxes or distress for rent and for fee-bills without a trial by jury." And further along the Court say:

"Our constitutional provision must then be interpreted to mean the same as the constitution of other States; and the word *and* used in it, be interpreted to men *or*. This must be its true interpretation, our constitutional convention intending to make no change in this fundamental principle of our government, and meaning only that no person should be deprivad of his life, liberty, or property without a trial by jury in those cases, where a trial by jury had been theretofore regarded as proper, and had been the recognized and established proceeding."

And now, reading this 10th section of our bill of rights, as the Court of Appeals say in this case it must be read, it is as follows:

"No person shall be deprived of life, liberty, or property, with out due process of law, *or* the judgment of his peers."

And this, I respectfully submit, effectually disposes of this part of the exceptions; none of the other sections of the constitution of the State referred to having any bearing upon the question. x

x And this, I submit, is not a federal question.

The counsel for plaintiff *in error* on page 11 of his brief says:

"There having been at the trial no discussion of question as applied to the evidence offered by the defendants, I am somewhat at a loss to discover upon what particular facts the court predicated its instruction." (Referring to the instruction set out in plaintiff's *fifth* bill of exceptions).

But his brief abundantly shows that he was not at a loss for the authorities relied upon by the counsel of the defendants in the trial before the jury as the basis of that instruction. Two very elaborate briefs had been prepared and were before the court in that trial in which about every case that had been decided by the courts of Virginia, and West Virginia, and by this Honorable court, bearing upon the questions of forfeiture involved in this case, were cited. And it was these briefs which enabled the counsel to *guess* so accurately, the cases that *would be relied on* in this Honorable court, to support the judgment of the Circuit Court in favor of the defendants.

The counsel for the plaintiff *in error*, seems to be laboring under the impression that when a non-resident of West Virginia choses to make a haphazard purchase of 500,000 acres of land lying mostly in that State, from a person whose title thereto has been forfeited to the State for his willful and intentional violations of the laws of the States in failing to pay his taxes, is entitled to great consideration and forbearance on the part of the authorities and people of that State, when he fails and refuses to do the same thing, except at his own will and pleasure. And he is clearly of the opinion, judging from what he says, that the payment of taxes on parts and parcels of the land by junior patentees and occupants, and others claiming title thereto adverse to him, should all enure to his benefit, and that he should only be required to pay the balance, if any, on the whole tract, remaining unpaid after crediting what has been so paid by the others, because, in his opinion, the State is not entitled to double taxes on the land.

It is true, as we shall see hereafter, that the courts differ with the counsel in this matter, but this is a matter of small consequence to him.

The council has prepared and filed in this case a most elaborate brief, which, with the Appendix attached, contains 132 pages, and a large portion of it is in the smallest kind of type. It is written without any system, and my reply to it thus far has been of the same character, and will so continue, so far as I shall reply at all.

As the advent of my brother Stiles into West Virginia dates with the advent of Mr. King and his claim to the 500,000 of land in question, I take it for granted that his client purchased the land under his advice that all constitutions and Statutes of the State of West Virginia forfeiting lands *for any cause*, were unconstitutional and void, for certain grammatical reasons which he doubtless explained to Mr. King, to his entire satisfaction. And now, when the authorities and people of West Virginia refuse to take off their hats and bow in humble submission to these modest pretentions of Mr. King, and the teachings of his counsel, that counsel deems it to be within the lines of his professional duty, to compare them with the worst classes of criminals known to the law. And now I will consider the first ground of exception to the instruction given by the court to the jury in the trial of the cause. And my contention, as to that instruction will be and is: That the provisions of the constitution of the State of West Virginia, for the forfeiture of lands, are *not* repugnant to, *nor* in conflict with Article XIV, Sec. 1, of the amendments to the Constitution of the United States, but that on the contrary thereof.

*What was due process of law before that amendment was adopted, has been and still is due process of law since that amendment was adopted.*

And the principal question now remaining to be discussed, and the one to which I shall mainly devote myself, is:

## WHAT IS DUE PROCESS OF LAW IN PROCEEDINGS BY A STATE FOR THE COLLECTION OF HER TAXES?

This question is of vital importance to the people of West Virginia. Her law forfeiting lands and vesting the titles of the former owners thereof in the State for their failure to pay the taxes assessed against them thereon, and for their failure for any five successive years after the year 1869, to have them entered on the land books of the proper county or counties, and charged with taxes thereon in their name, are all based upon the laws of Virginia, her mother State.

And my knowledge of the land titles in West Virginia, acquired in a practice of the law for 57 years, enables me to say, that at least, one-half of the titles of the people of West Virginia to the lands held by them, date back to the forfeiture of the large surveys made prior to the year 1800, and afterwards abandoned by their owners, and forfeited by the laws of Virginia, for the rea-

sons aforesaid. No greater disaster could befall the people of West Virginia in regard to the titles to their lands, than a decision of this Honorable Court declaring that the laws of both States forfeiting land therein were and are unconstitutional and void. And in view of the high and abundant authorities, including the many decisions of this Honorable Court in favor of their validity, I cannot anticipate such a decision.

Judge Cooley, in his work on Constitutional Limitations, 2nd Edition, page 357, says:

"Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is an inherent authority to appropriate the property of the citizen for the necessities of the State, and Constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse."

And on page 353 of the same edition he says:

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general laws which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

And on this definition Judge Cooley comments as follows:

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

And the Dartmouth College case, in which Mr. Webster gave this definition was the common law action of *Trover* in which the defendant pleaded *not guilty*, and the case was tried by a jury. The validity of a statute of the State of New Hampshire was involved in it, but the statute in question was held by this Honorable Court to be "a law impairing the obligation of a contract." And

in discussing the power of taxation, on page 479 of the same edition, Judge Cooley says :

"The power to impose taxes is so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatsoever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation ; to every object of industry, use, or enenjoyment ; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of government affect more constantly and intimately all the relations of life than through the exactions made under it.

"Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not."

And in his "Treatise on the Law of Taxation," commencing on page 47, 2nd edition, Judge Cooley, speaking of the words, "Law of the Land," says : "There is a constitutional guaranty which has come to us from Magna Charta, which declares that no person shall be deprived of life, liberty or property, except by the judgment of his peers or the law of the land. The alternative provisions of this guaranty have sometimes been supposed to mean the same thing, and the guaranty itself to entitle every person to have any demand made upon him, tried by a jury of the vicinage. Such a construction applied in tax cases would work a thorough and radical change in the principles on which taxation is now supposed to rest. It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve, to a review and possible reversal at the hands of a jury.

It would not so much strengthen the judicial department as it would weaken the legislative ; for the courts themselves, though juries sit with and as a part of them, are compelled to recognize a large degree of independence in the action of these assistants. Such independence is often useful, and never can be seriously det-

rimental when a verdict determines a single controversy only ; but to make juries the assessors of the claims of the State upon individuals could only introduce anarchy ; one jury reaching one conclusion regarding the public needs and the justice of its demands, and another, another, until the State would be without general rule, and must fall to pieces from the incurable insufficiency of its government. Such a construction of a clause agreed upon as an important provision in a charter of government can never have been intended.

It has long been settled that while one is to be protected in his interests by the 'law of the land,' he has a right to 'the judgement of his peers' only in those cases in which it has immemorially existed, or in which it has been expressly given by law. The clause cited from Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself the law of the land. And an act for levying taxes and providing the means of enforcement is as we have seen within the unquestioned and unquestionable power of the 'legislature.'

It is, therefore, the law of the land not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for, in order to give the rule full operation. As has been well said, the mode of levying as well as the right of imposing taxes is completely and exclusively within the legislative power, which it is to be presumed, will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial, would materially impede, if not wholly obstruct, the collection of the revenue." Further along he says: "This subject has acquired additional importance since the adoption of the fourteenth amendment to the Federal Constitution,

which provides, among other things, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

Since this amendment, whenever it is claimed that a revenue law either in intent or in administration, deprives the owner of his property without due process of law, or takes from any person his right to the equal protection of the laws with all others, a Federal question may be raised upon which the decision of the Federal Supreme Court will be authoritative and conclusive: It is, therefore, of high importance to know what that Court has decided under this amendment in tax cases."

And on page 432, speaking of the collection of taxes, Judge Cooley says: "Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of State necessity. Without them it might be possible for a party which has been defeated in its efforts to obtain possession of the government in the constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the State might be deprived of the resources for continuing its existence and performing its regular functions until a revenue was collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties."

And on page 438, speaking of the collection of taxes by *distress and sale of chattels*, he says: "It has been well said of collection by distress: This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence. It has been continued by all the States since their independence, and has existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation. This is conclusive of the right to provide for it."

Counsel for the plaintiff *in error* refers occasionally to Judge Cooley, but always holds up before he reaches anything that hurts him.

And now I propose to show that this same custom and usage of

collecting taxes by distress and sale of property, prevailed in Virginia from A. D., ~~1629~~, to A. D., 1863, when West Virginia became a State of the Union. And that for many years during that period, real estate, as well as personal, was distrained and sold by the collector of taxes, alike, for the payment of the taxes thereon.

The first charter of the Colony of Virginia was granted the 10th day of April, 1606, and the first Legislative Assembly ever convened in the colony met at James Town in June, 1619. And the laws passed at each session after that existed only in manuscript until 1733, when Purvy's Collection of Statutes was published in London, but in very bad form. Afterwards William Waller Henning was authorized to collect and publish this colonial legislation from the manuscripts containing it, and how he proceeded in doing this he explains fully in his preface to the work, dated Richmond, August 29, 1809.

From June, 1619 to October, 1629, Mr. Henning simply names the subjects of legislation engaged in, without any indication of the form in which it was done, and I find nothing during these ten years in relation to the assessment or collection of taxes. But at the session commencing October 16, 1629, he commences a more formal statement of the Acts passed by the Assembly, sometimes called the General Assembly and sometimes the Grand Assembly.

Their proceedings show that they were by no means experts in drafting statutes, but they knew what they wanted and provided for it as best they could. The first Act they passed was as follows:

ACT I.

After debate of many matters, it was *thought a business of great benefit and good consequence* to send and maintain a company of men to plant *corne* at Kyskyache, the charge of building to be borne equally by all that shall be adventurers, and to *bee* there seated by the 15th of November next, whereupon *voluntarily* the Governor offered 3 men, Captain Mathews 4. "(and so on until 27 men in all were offered by those present), it was ordered that they should have shares of land to them and their heirs."

And on page 142 of the same vol. (vol. 1.) we find the first act passed by the Assembly assessing a tax for the support of the government of the colony, and providing for its collection as follows:

"OCTOBER, 1629—5TH JAMES 1ST.

## ACT. VI.

This act first allows quite a number of claims due to sundry individuals, and provides for their payment, as follows:

"To defray all of the charges above said, the whole assembly concluded that there should be five pounds of tobacco per *pol* levied through the colony. And it was further concluded and ordered that every master of a family, and that every freeman that is to pay five pounds of tobacco per *pol* as aforesaid for defraying the *publique* charges, shall bring the same unto the Houses of the Burgesses of the plantations within two days after notice thereof given unto them. And if any shall fail to bring the same, it is thought fit that by virtue of this order the said Burgesses shall have power to levy the same by distress upon the goods of the delinquents, and to make sale of the said goods, and to detain such tobacco which shall be due by this order, and for their fees in making this distress, restoring to the owner of said goods the residue and remainder. And if the Burgesses shall make neglect herein, they shall be fined by the Governor and Council.

The Burgesses *doe* undertake to provide caskes to *putt upp* the same, and if any damage shall befall unto the tobacco, it shall not light upon the Burgesses, unless they shall be faulty therein.

All the Burgesses are with all convenient speed to send to the Governor a list of the tithable persons within their plantations, that thereby the Governor may appoint those that are creditors of this tobacco, to receive it, and that he take order to have the account kept of the same."

And thus it appears that the first legislative act of the colony of Virginia imposing a tax for the support of her colonial government, of which we have any knowledge, provided for its collection by the summary remedy of distress and sale of the property of the delinquent tax-payer. And the attention of the court will now be called to the following series of acts of Virginia and West Virginia, providing for the collection of their taxes without any sort of *judicial* process. All my references for the statutes named will be Henings Statutes at Large, until notice is given to the contrary.

MARCH, 1645.—21st CHARLES 1st, Vol. I, pp. 229-30.

## ACT. XXI.

*Be it enacted by the Grand Assembly, and the authority of the same.*

"Thst all levies that shall accrue from the *publique* shall be satisfied by the last of November following. And in case of nonpayment that the sheriff be enabled to make seizure of the tobacco of the delinquent which in all probability will not be disposed of before that time, whereby the *publique* credit may be better preserved and the creditors satisfied in kind."

OCTOBER, 1646—21st CHARLES 1st, Vol. I, p. 337.

## ACT XXIII.

This Act, after reciting the necessity for its passage, reads as follows:

"*It is therefore enacted by the Grand Assembly*, That the sheriff of the several counties respectively, do levy, if occasion be, by distress, and make such payments to such persons and for such debts as are hereunder meationed."

MAY, 1730.—3RD AND 4TH GEORGE 2D, VOL 4, pp. 255-6.

## CHAPTER XV.

At this session the first act with a title at its head was passed as follows:

"*An Act for Raising a Public Levy.*"

"*Be it enacted by the Lieutenant Governour, Council and Burgess of the present General Assembly, and it is hereby enacted by the authority of the same.*"

Tho 21st section of this act reads as follows: "And to the end that the *publick* county and parish levies, secretaries, clerks and other officers-fees may be discharged in due time, Be it further enacted by the authority aforesaid, That during the continuance of this act, all public county and parish levies, quit-rents, secretaries, clerks, surveyors and other officers-fees, payable in tobacco, shall

be paid and satisfied by the persons, chargeable with and indebted for the same, to the sheriff or other collector, by inspectors notes before the tenth day of April, yearly. And if any person chargeable with the dues or fees aforesaid, shall neglect or refuse to pay the same within the time aforesaid, it shall and may be lawful to and for the sheriff or other collectors, immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof for tobacco, in the same manner as is directed by law for goods taken in execution."

MAY, 1742,—15TH GEORGE 2ND, VOL. 5, pp. 124, 138-9.

## CHAPTER I.

Section 28 of this Act reads as follows:

"28. *And be it further enacted*, That all public, county and parish levies, quit-rents, secretary's, sheriff's, clerk's, surveyor's and other officers' fees payable in tobacco, shall be paid and satisfied by the person chargeable with, and indebted for the same, to the sheriff or other collector, by inspectors' notes, before the tenth day of April, yearly. And if any persons chargeable with the levies, quit-rents, and fees aforesaid, shall neglect or refuse to pay the same, within the time aforesaid, it shall and may be lawful to and for the sheriffs or other collectors immediately after the said tenth day of April, to distrain the goods and chattels of the person or persons so neglecting and refusing, and to sell and dispose thereof, for tobacco, in the same manner as is directed by law for goods taken in execution. And the overplus (if any be) after paying the said levies, quit-rents and fees, which is hereby declared to be the same as for serving any execution, shall be returned to the debtor."

OCTOBER, 1748,—22ND GEORGE 2ND, VOL. 5, pp. 515 AND 518.

## CHAPTER X.

At this session an act was passed prescribing the method of appointing sheriffs, and for limiting their continuence in office, and directing their duties therein. Section 9, of this act provided as follows:

"9. *And be it further enacted*, That where any person or persons holding lands of his majesty, shall fail to pay and satisfy the

quit-rents due for the same, or where any person or persons shall be indebted for public county or parish levies, and shall not discharge the same within the time limited by law for the payment thereof, it shall be lawful for the Sheriff or collector of such quit-rents or levies, or either of them, to distrain any of the slaves, goods or chattels found upon the lands and in possession of the person so indebted, or failing, notwithstanding such slaves, goods, or chattels shall be comprised in any deed of trust. And if the owner thereof shall not pay the quit-rents or levies due, within five days after such distress, such Sheriff or collector, shall and may lawfully sell, by public auction, the slaves, goods and chattels, distrained, or so much thereof as shall be sufficient to satisfy the said quit-rents or levies, and the charges of distress and sale. But he shall give notice of the time and place of sale at the church of the parish wherein the distress shall be, by setting up a notice thereat, before the service begins, at some convenient or usual place near such church, and by publishing the same in the church-yard, immediately after divine service on the next Sunday after the expiration of said five days, which said sale shall not be in less than three, nor more than six days, after notice so given, and shall be good and effectual in law, against all and every person and persons whatsoever, claiming or pretending to claim any right, title, or interest, in, or to any of the said slaves, goods or chattels."

In 1775 the colony of Virginia, in concert with other colonies revolted against the authority of Great Britain, and at a convention of her people held in Richmond June 29, 1776, she declared, among other things, that the government of Virginia as formerly exercised under the crown of Great Britain was "TOTALLY DISSOLVED."

OCTOBER, 1777,—2ND OF THE COMMONWEALTH.

The first *general* law passed by the *General Assembly* (the Legislature) of Virginia providing for the levy and collection of taxes for the support of the State Government, after the Declaration of Independence was adopted by Congress, was passed at this session. It was entitled "*An act for raising a supply of money for publick exigencies.*"

Section VIII, of this Act, provides for the collection of the tax levied under it, as follows:

"*And be it further enacted*, That the commissioners of the tax in each county or corporation shall, on or before the first day of August annually, deliver to the Sheriff of the county, or to the collector or collectors appointed as aforesaid, a full and perfect list, formed from the returns of the several assessors, of all the persons, in alphabetical order, who resides in the county, and are to pay any rate or tax pursuant to this act, with the amount of what each person is to pay, collecting together what the same person shall be assessed in different hundreds, and distinguishing in what hundred the person chargeable resides or hath effects, taking a receipt from the Sheriff or collector for the same, and thereupon such Sheriff or collector shall proceed to collect and receive the several taxes and rates according to such list, and to levy the same by distress and sale of the slaves, goods and chattels, of such person who shall fail to pay what he or she shall be so assessed on or before the first day of September in any year, the sale of which estate shall be made not less than five days after the distress, for ready money, and notice thereof shall be published at the parish church, or most convenient meeting house, and no security shall be taken, or writ of replevin sued out thereupon; but no Sheriff or collector shall seize any slave for such taxes where other sufficient distress shall be shown him, nor make any unreasonbale distress, on pain of being liable to the action of the party grieved, wherein the plaintiff shall recover full cost, although the damages shall be under forty shillings.

NOVEMBER, 1781,—6TH OF THE COMMONWEALTH.

At this session an act was passed, entitled:

*An act for ascertaining certain taxes and duties, and for establishing a permanent revenue.*

Sections *two*, *four* and seventeen of this act provide as follows:

2. "*And be it further enacted*, That there shall be collected, paid and distrained for the tax of one pound for every hundred pounds. And so in proportion for a greater or lesser sum, of the valuation of all lands and lots, as the same shall be returned by the commissioners to the clerk of each county within this commonwealth; also a tax of ten shillings for every free male person above the age of twenty-one years, who shall become a citizen of this commonwealth, and also upon all slaves, to be paid by the owners thereof, except such free persons and slaves as shall be

exempted on applications to the respective county courts through age or infirmity; also two shillings for every horse, mare, colt and mule; also three pence per head for all net cattle; also five shillings per wheel for all coaches, chariots, phætons, four wheeled chases, stage wagons for riding carriages, chairs and two wheeled chaises; also fifty pounds for every billiard table and five pounds for every ordinary license, which tax shall be paid annually in the manner hereinafter provided."

"4. And the said sheriff shall, from and after the tenth day of June annually, collect and receive from all and every person and persons chargeable therewith, the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of July annually, the said sheriff shall have power to distrain the land or slaves, goods or chattels which shall be found upon the lands, and in the possession of the person so indebted, or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes and charges of distress and sale, giving six days notice of the day and place of sale, by advertising the same at the church or other public places in the parish wherein such distress shall be, on the next Sunday after the expiration of the said five days, which shall be good and effectual in law, against all persons whatsoever; *Provided*, That in all cases where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall give at least four weeks notice in the public papers before any sale shall be made of the same: and where other sufficient effects can be had thereon, distress shall not be made of such lands: *Provided always*, That where unreasonable seizures or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages shall be given."

"17. *And be it further enacted*, That where any distress shall be made pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*."

This act, it will be observed, authorizes the distraint and sale of

both real and personal estate for the payment of the taxes thereon. And this method of collecting taxes by the distraint and sale of real estate continued for several years thereafter, when the delinquent list was substituted for it.

It is worthy of observation, also, that the *first* act which levied a tax on real estate, also made it liable to distress and sale for the taxes levied on it, the same as for taxes on personal estate.

OCTOBER 1782—7TH OF THE COMMONWEALTH.

VOL. XI. P. 112.

At this session an act was passed entitled as follows:

"*An act to amend and reduce the several acts of assembly for ascertaining certain taxes and duties, and for establishing a permanent revenue into one act.*"

The *second* section of this act provides for the levy and collection of additional taxes, as follows:

"*Be it enacted*, That from every owner of land or lots within this commonwealth, in addition to the tax already imposed, there shall be collected and distrained for, fifty per centum on the amount, or ten shillings on the pound of all sums payable for tax on lands and lots, as the same may be charged by the examiners appointed under the act of the present session of assembly, for equalizing the land tax." And section IV, among other things, provides for the collection of the taxes assessed, as follows: "And the said sheriff shall, from and after the first of May annually, collect and receive from all and every person and persons chargeable therewith the taxes imposed by this act in his said county; and in case payment be not made or received on or before the first day of June annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same or so much thereof as shall be sufficient to discharge the said taxes and the charges of distress and sale, for ready money; but if the same will not sell, in the opinion of the officer making the distress, for three-

fourths of their value, then the same shall be sold for one month's credit, giving six days notice of the day and place of sale, by advertising the same at the church, or other public places in the Parish wherein such distress shall be, on the next Sunday after the expiration of said five days, and shall take sufficient security residing in the county, for the payment thereof; and in case the same shall not be paid within the said one month, such officer is hereby authorized and required to make immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their securities, and proceed to sell the same for the best price that can be got in ready money; which several sales shall be good and effectual in law against all persons whatsoever. *Provided, always*, that where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall sell the smallest number of acres that the lowest bidder will pay the taxes for, together with the charges of distress and sales which shall be laid off by the Surveyor of the county and conveyed by the sheriff. The proprietor of the land, his or her agent or attorney, may appoint, on the day of sale, what of the tract shall be sold; and in case of failuure so to do the sheriff or collector shall sell that part as in his opinion will least injure or prejudice the tract; and where other sufficient effects can be had thereon, distress shall not be made of such lands. *Provided, always*, that where unreasonable seizure or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages are given."

This is the last quotation from Henning's statutes at large.

My next quotation will be from the following Appendix to Vol. 2nd of the Revised Code of Virginia, of 1819.

## APPENDIX IV.

To Vol. 2nd, of the Code of Virginia of 1819, containing "*a series of laws concerning forfeitures and sales of lands for taxes.*

I quote this series so far as relate to the distraint and sales of lands and other property for taxes, precisely as I find them in this Appendix.

And some of them are amendments to acts and parts of acts already referred to.

The first of the series is as follows:

C. 1.

Passed November, A. D. 1781.

"Part of the fourth section and seventeenth section of an act entitled, '*An act for ascertaining certain taxes and duties and for establishing a permanent revenue.*'"

"4. And, for the collecting and accounting for the taxes imposed by this act, *Be it enacted*, That the court of every county within this Commonwealth, respectively, shall, in or before the month of *May*, annually, take bond of the sheriff, with sufficient security, in the penalty of ten thousand pounds, payable to the treasurer of this Commonwealth, for the time being, and his successors, for the use of this Commonwealth, and conditioned for the true and faithful collecting, paying and accounting for, all taxes in his county hereby imposed; and the said bond shall be recorded in the court where the same is taken, and an attested copy thereof shall be transmitted by the respective clerks, without delay, to the auditors of public accounts, which shall be admitted as evidence in any suit or proceeding founded thereon. And the said sheriff shall, from and after the tenth day of June, annually, collect and receive, from all and every person and persons chargeable therewith, the taxes imposed by this act in his said county; and, in case payment be not made or received on or before the first day of *July* annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands, and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels, shall be comprised in any deed or mortgage; and, if the owner thereof shall not pay the taxes due, within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the said taxes, and the charges of distress and sale, giving six days notice of the day and place of sale, by advertising the same at the church or other public place in the parish wherein such distress shall be, on the next Sunday after the expiration of the said five days, which sale shall be good and effectual in law, against all persons whatsoever: *Provided*, That in all cases where any sheriff or collector shall make seizure of any lands by virtue of this act, he shall give at least four weeks notice in the public papers, before any sale shall be made of the same, and where other sufficient effects can be had therein, distress shall not be made of such lands: *Provided*,

always, That where unreasonable seizures or distress shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs, where any damage shall be given."

"17. "*And be it further enacted*, That where any distress shall be made, pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value, in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*."

C. 2, p. 509.

"*The ninth section of the act, entitled, 'An act to amend the act for ascertaining certain taxes and duties, and for establishing a permanent revenue.'*"

Passed May, 1782.

"9. *And be it further enacted*, That so much of said act, as declares, that, when any distress shall be made, pursuant to this act, and the lands, goods or chattels will not sell for three-fourths of their value, in the opinion of the officer making such distress, the same shall be sold for three months credit, in the same manner as goods taken by *fieri facias*, shall be repealed: And in all such cases, as aforesaid, the officer making such distress, shall sell the lands, goods or chattles, so distrained, for one month's credit, and shall take sufficient security, residing in the county, for the payment thereof; and, in case the same shall not be paid within said one month, such officer is hereby authorized and required to make immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their security or securities, and proceed to sell the same for the best price that can be got in ready money."

C. 3. p. 510.

"*Part of the fourth section, and the twenty-fourth section of the act, entitled, 'An act to amend and reduce the several acts of Assembly, for ascertaining taxes and duties, for establishing a permanent revenue, into one act.'*"*

[Passed October, 1782.]

"4. And the said sheriff shall, from and after the first day of *May*, annually, collect and receive, from all and every person and persons chargeable therewith, the taxes imposed by this act, in his

said county; and, in case payment be not made or received, on or before the first day of *June* annually, the said sheriff shall have power to distrain the lands or slaves, goods or chattels, which shall be found upon the lands and in the possession of the person so indebted or failing, notwithstanding such lands, slaves, goods or chattels shall be comprised in any deed or mortgage; and, if the owner thereof shall not pay the taxes due within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as shall be sufficient to discharge the immediate distress on the lands, goods or chattels of such purchaser or purchasers, his, her or their security or securities, and proceed to sell the same for the best price that can be got, in ready money; which several sales shall be good and effectual in law, against all persons whatsoever: *Provided, always*, That, where any sheriff or collector shall make seizure of any lands, by virtue of this act, he shall sell the smallest number of acres that the lowest bidder will pay the taxes for, together with the charges of distress and sale, which shall be laid off by the surveyor of the county and conveyed by the sheriff. The proprietor of the land, his or her agent or attorney, may appoint, on the day of sale, what part of the tract shall be sold; and, in case of failure so to do, the sheriff or collector shall sell that part as, in his opinion, will least injure or prejudice the tract; and, where other sufficient effects can be had thereon, distress shall not be made of such lands: *Provided, always*, That where unreasonable seizures or distresses shall be made, the party grieved shall have an action against the sheriff or collector, and shall recover full costs where any damages shall be given."

C. 5, p. 515.

*An act to remedy abuses in the manner of selling lands for the payment of public taxes.*

[Passed January 7, 1788.]

1. "Whereas, the manner of selling land, as heretofore practiced by the various sheriffs and collectors, for the payment of the public taxes due thereon, has, in many instances, produced great oppression; for remedy whereof in future, *Be it enacted*, that all sales of land for the payment of taxes shall be on the premises; and any sale made thereof otherwise shall be void.

2. No sale shall be made of land for payment of taxes, if other property sufficient, belonging to the person chargeable with the land tax, can be found in the county.

3. Before any sale shall take place of any land for payment of taxes, notice thereof shall be given at least eight weeks in the Gazette of the public printer, and shall be advertised at the Court House of the county where the land lies, on the first day of two several courts previous to such sale; and proclamation shall also be made thereof at the door of the Court House, on the said days, between the hours of twelve and four.

4. All sales of land so made, shall be conducted by the high sheriff, where the sheriff has entered into bond for the collection of the taxes. And, if any other person hath been or shall be appointed by the court to collect the taxes, the sales of land made to discharge the taxes shall be conducted by the said collector and not by a deputy.

5. The said high sheriff or collector of taxes shall give to the commissioner of the land tax in his county at least thirty days notice, previous to any sale of land as aforesaid; and the said commissioner shall attend the said sale, for which he shall be allowed six shillings, to be paid by the person chargeable with such land tax; and if the land so offered for sale will not yield a price in the opinion of the said commissioner, equal to one-half the value thereof, taking for his guide, in estimating the value, the price at which such land is charged; by the act equalizing the land tax, and having regard to the quality of the particular part of the land so offered for sale, then the said commissioner shall bid for and purchase the said land on account of the public, and shall give to the sheriff or collector a certificate thereof, expressing therein the amount of taxes for which such land hath been sold; which certificate, being by the said sheriff or collector paid to the treasurer, he shall have credit for the same, in part of the land tax; and the person who was charged originally with the said land tax, may discharge the same, and be entitled to all the estate he held to such land, in as full and ample a manner as if the said sale had never been made; *Provided*, Payment be made of the said taxes agreeably to the certificate of the commissioner, into the public treasury, at any time within six months after such certificate shall be delivered to the treasurer, together with twenty-five per centum

damages on the amount thereof; or if payment be made at any time, not less than six months, nor more than two years thereafter, the same may be discharged by payment of double the amount of said certificate. But, provided payment shall not be made thereof within two years from the time that such certificate shall be paid to the treasurer, then, and in that case, the Governor shall appoint such person or persons, as may to him, with the advice of council, seem proper, to sell the said land and convey the same to the purchaser thereof, and pay the amount of the debt due to the public, with the damages and expenses of sale in the first instance from the money arising from the sale thereof, and to pay the surplus, if any, to the person who may have been the proprietor of the land, at the time the commissioner of the taxes may become the purchaser thereof, on public account, or to the legal representative or representasives of such proprietor."

"*An act to amend an act entitled, 'An act to remedy abuses in the manner of selling lands, for the payment of public taxes.'*"

[Passed December 27, 1790.]

1. *Be it Enacted by the General Assembly*, That so much of all and every act and acts as directs the sale of any lands for the payment of the tax thereon, shall be and the same is hereby repealed.

2. *And be it further enacted.* That each sheriff or collector of taxes within this commonwealth, shall at the time he returns a list of other insolvents, return a list of the lands within his county, or corporation, where he can not find effects within the same belonging to the owner or tenant thereof, sufficient to satisfy and pay the tax. And if the court shall be satisfied of the truth thereof, they shall admit the sheriff or collector to make oath thereto, and direct the same to be certified to the auditor of public accounts, together with the names of the owners of each tract of land, and the place of his or her abode, where the court can obtain such information.

3. The auditor shall credit the same in account for the land tax with such sheriff or collector. And where it shall appear to the auditor from the certificates of the county courts, or where he shall be satisfied from other information, that any person so chargeable with any of the said taxes, resides, or hath any slaves or personal property in some other county of this Commonwealth, than that in which such land may lie, he shall certify the amount of the land tax with which such person is or shall be chargeable

to the sheriff or collector of the county in which such person may reside, or have slaves or personal property, as the case may be, and shall debit such sheriff or collector with the amount of the taxes so transmitted to him, who may make distress for the same, and shall be accountable therefor, in like manner as for other taxes of his county.

4. A list of these insolvents, with the amount of the tax due from them respectively, shall be furnished by the clerk of the court to the collector of the tax for the succeeding year, and he shall also transmit a copy thereof to the auditor of public accounts, who shall debit the sheriff or collector therewith; and such sheriff or collector shall distrain and account for the same in like manner as for other taxes. And in case the said taxes cannot be collected the succeeding year, the like return upon oath shall be made, as is hereinbefore prescribed; and thereupon the treasurer shall cause to be inserted in the Virginia Gazette, for three weeks successively, the names of such delinquents, with the quantity of land, the situation thereof, and the taxes due thereon.

5. *And be it further enacted*, That in case the tax on any tract of land within this commonwealth shall not be paid for the space of three years, the right to such land shall be lost, forfeited, and vested in the commonwealth; and it shall be lawful for any person to acquire title to any land so forfeited, in the manner prescribed for acquiring titles to waste and unappropriated lands within this commonwealth, on the eastern waters, by an act, entitled, "An act to dispose of waste and unappropriated lands in the Commonwealth of Virginia, on the eastern waters."

C. 11, p. 524.

*The twenty-ninth, thirty-fourth, and thirty-fifth sections of the act, entitled, "An act prescribing the mode of ascertaining the taxable property within the Commonwealth, and of collecting the public revenue."*

[Passed December 13, 1792.]

"29. It shall and may be lawful for all deputy sheriffs to collec and make distress for any taxes which may be due at the time of the death of their high sheriff, and shall be accountable for the same, in like manner as if the sheriff had lived, and no sheriff or

collector shall be allowed to distrain for any taxes after two years from the time the taxes became due, except sheriffs appointed prior to the year one-thousand seven hundred and ninety-two, who shall have power of distraining for the taxes now due, for the term of eighteen months from the passing of this act: *Provided, nevertheless*, That no sheriff or collector shall be allowed to distrain for such arrearages, until he shall have entered into bond, with sufficient security, to be approved by such court, to pay and satisfy all such damages and costs as may be recovered against him, for any abuse of the power hereby vested in him."

"34. The sheriff or collector of taxes within this Commonwealth, shall, at the time he returns a list of other insolvents, return a list of the lands within his county, or corporation, where he cannot find effects within the same, belonging to the owner or tenant thereof, sufficient to pay and satisfy the tax, and if the court shall be satisfied of the truth thereof, they shall admit the sheriff or collector to make oath thereto, and direct the same to be certified to the auditor of public accounts, together with the names of the owners of each tract of land, and the place of his abode, where the court can obtain such information. The auditor shall credit the same in account for the land tax, with such sheriff or collector. And, where it shall appear to the auditor from the certificates of the county courts, or where he shall be satisfied from any other information, that any person so chargeable with any of the said taxes resides, or hath any slaves or personal property, in some other county of this Commonwealth, than that in which such land may lie, he shall certify the amount of the land tax with which such person is or shall be chargeable, to the sheriff or collector of the county in which such person may reside or have slaves or personal property, (as the case may be) and shall debit such sheriff or collector with the amount of the taxes so transmitted to him, who may make distress for the same, and shall be accountable therefor, in like manner as for other taxes of his county. A list of these insolvents, with the amount of the tax due from them respectively, shall be furnished by the clerk of the court to the collector of the tax for the succeeding year, and he shall transmit a copy thereof to the auditor of public accounts, who shall debit the sheriff or collector therewith; and such sheriff or collector shall distrain and account for the same, in like manner as for other taxes; and, in case the said taxes cannot be collected the succeeding year, the like return upon oath shall be made, as is hereinbefore prescribed; and

thereupon the treasurer shall cause to be inserted in the *Virginia* Gazette, for three weeks successively, the names of such delinquents, with the quantity of land, the situation thereof, and the taxes due thereon.

35. In case the tax on any tract of land within this Commonwealth, shall not be paid for the space of three years, the right to such lands shall be lost, forfeited and vested in the Commonwealth; and it shall be lawful for any person to acquire a title to any land so forfeited, in the manner prescribed by an act. entitled, *An act for reducing into one, the several acts concerning the land office; ascertaining the terms and manner of granting waste and unappropriated lands; for settling the titles and bounds of lands; directing the mode of processioning; and prescribing the duty of surveyors.*

C. 16, p. 530.

*An act to amend an act, entitled,* "*An act more effectively to provide for the payment of taxes upon lands within this Commonwealth.*"

[Passed January 20, 1807.]

"1. *Be it enacted by the General Assembly*, That when taxes on any tract or parcel of land shall have heretofore remained, or shall hereafter remain unpaid, for the space of two years, such tract or parcel of land shall be forfeited to the Commonwealth, and shall not be subject to location. *Provided, nevertheless*, That the tract or parcel of land, so as aforesaid forfeited, shall be subject to the redemption of the former rightful and proper owner, at any time within three years after such forfeiture shall have occurred, upon payment of the taxes due thereupon, according to the following rules, to-wit: That if the said taxes shall be paid in the first year after such forfeiture shall have occurred, there shall be paid an interest of twenty-five per centum per annum, on the amount of the said taxes from the time they became due, till paid; if the said taxes shall be paid in the second year after such forfeiture shall have accrued, there shall be paid an interest of fifty per centum per annum on the amount of taxes due as aforesaid. If the said taxes shall be paid in the third year after such forfeiture shall have accrued, there shall be paid an interest of one hundred per centum per annum as aforesaid: *Provided, also*, That nothing in this act shall be construed as to affect the rights of infants, femes covert,

or persons of unsound mind, until one year after the disabilities shall have ceased, on their paying all taxes due, with an interest thereon, at the rate of ten per cent per annum on the amount due as aforesaid."

C. 17, p. 531.

"*An act providing for the redemption of certain lands forfeited by the non-payment of the taxes thereon.*

[Passed February 6, 1809.]

1. *Be it enacted by the General Assembly*, That all lands heretofore forfeited, or hereafter to be forfeited to the Commonwealth for the non-payment of taxes, by virtue of the laws now in force, shall be redeemable at any time within three years from the time when such forfeiture hath heretofore accrued, or shall hereafter accrue, and until the first day of March next succeeding the expiration of the said term of three years, on payment of the taxes due thereon, with an interest of ten per centum per annum, on each year's tax, from the time when the same became or shall become due, until the time of such redemption: *Provided, nevertheless*, That all lands heretofore forfeited shall be redeemable in like manner, and on payment of the like interest, on or before the first day of March, in the year one thousand eight hundred and ten.

2. *Be it further enacted*, That the auditor of public accounts shall, on or before the first day of March, in the year one thousand eight hundred and eleven, and on or before the first day of March, in every year thereafter, deliver to the collector of the taxes of each county, a list of all such forfeited lands therein, as, on the first day of March preceding, had become irredeemable; which list shall be forthwith posted or hung up in the most public place in the court-house of the county.

3. *Be it further enacted*, That, on the first Monday in August, in the year one thousand eight hundred and eleven, and on the first Monday of August, in every year thereafter, the collectors shall proceed, by public auction, at the door of the court house of each county, to sell to the highest bidder, each tract of land contained within the list of such forfeited lands as were irredeemable on the first day of March, in the preceding year, for ready money.

4. *Be it further enacted*, That, if at any such sale the former owner or owners of any forfeited tract of land, so about to be sold,

or any person for him, her or them, or in his, her or their behalf, with or without any authority or direction for that purpose, shall appear and pay the taxes due thereon, with interest as aforesaid, until the time of such sale, such tract shall not be sold, but an entry of such payment shall be made by the collector on the list aforesaid, and a receipt for such payment given to the person making the same, in the name of the former owner or owners; and, thereupon such land shall be taken to be redeemed, and the forfeiture accrued thereon shall be, and the same is hereby fully waived and remitted.

5. *Be it further enacted*, That it shall be the duty of the commissioner or commissioners of the revenue, annually, on the first Monday of August, to attend at the court house of their respective counties, and to take and make a list of all the sales so to be made by the collector. Specifying the name or names of the former owner or owners, the sums paid, to whom sold; which list the commissioner or commissioners shall forthwith transmit to the Auditor of Public Accounts, who shall charge the collector with the amount of sales appearing thereon."

The only other section of this act which I deem necessary and proper to be inserted here, is section—

"8. *Be it further enacted*, That it shall be the duty of every collector making a sale by virtue of this act to make and execute to the purchaser a deed in fee simple for the lands purchased reciting the cau-e of the sale; and in every action or suit at law or in equity, in which a former owner or owners of any tract of land, so sold and conveyed, his, her, or their heir or devisee, or other person or persons claiming under him, her or them, shall contest the validity of the sale so made, the *onus probandi* shall be upon the party so contesting."

C. 18, p. 533.

*An act to compel persons who own land in this Commonwealth to cause the same to be entered in the Book of the Commissioners of the Revenue, and for other purposes.*

[Passed February 5, 1810.]

1. Whereas, It is represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue thereupon; for remedy whereof, *be it enacted*, That if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter

the same on the commissioner's books of that county in which the land lies within eighteen months after the passage of this act, the same shall be forfeited to this Commonwealth: *Provided always*, That the rights of infants, femes covert and persons of insane memory shall not be affected by this law.

2. *And be it further enacted*, That the land so forfeited shall be sold, and the money to arise from such sale shall be paid into the public treasury there to remain at the disposition of the General Assembly.

3. *And be it further enacted*, That the high sheriff, the clerk of the supreme court of law, and the attorney for the Commonwealth in each county, or any two of them, shall be, and are hereby authorized as commissioners, to make sale of the lands so forfeited and execute deeds therefor.

4. *And be it further enacted*, That every person who shall make discovery and proof to the county court of lands forfeited by virtue of this act shall receive therefor ten per centum upon the amount of the sale of any such lands. And it shall be the duty of the said court, immediately upon such discovery and proof, in a summary way to make an order in the nature of a decree directing the aforesaid commissioners to sell said land to the highest bidder for ready money. *Provided, nevertheless*, That no sale shall be made by virtue of the act, unless the same shall have been advertised two months previous thereto at the door of the court house of that county wherein said lands shall lie. *And provided also*, That the said forfeited land shall be sold at public auction, on some court day, not more than four nor less than two months after the rendition of the decree aforesaid. *Provided also*, That no person shall receive said per centum for discovery and proof of forfeited lands, nor shall any proceedings be had relative to such proceedings by the court, until the first day of June, in the year one thousand eight hundred and twelve."

The following is the only other section of this act I deem it necessary to insert:

"13. *Be it further enacted*, That the deeds to be made in virtue of the *third* section of the aforesaid act, shall be made by the commissioners appointed by the act or by any two of them, and not by the sheriff only."

C. 24, p. 542.

*An act to amend and explain the act entitled "An act concerning taxes on lands."*

[Passed February 9, 1814.]

"1. *Be it enacted by the General Assembly*, that the commissioners of the revenue shall annually make out their books containing a list of the land tax within their respective districts, and that said books shall be in the form following:

List of the land tax within the district of A. B. commissioner in the county of C. for the year.

| Name of owner. | Residence. | Estate. | Number of town lots. | Name of the town. | Yearly rent of lots. |
|---|---|---|---|---|---|
| Amount of taxes upon lots at —— in —— | Number of acres of land. | Description of the land. | Distance and bearing from the court house. | Rate of land per acre | Total value of land. |
| Amount of tax upon land at —— per —— | Total of tax on lots and land. | Explanation of alterations during the preceding year. | | | |

The said commissioners shall enter each tract of land and town lot separately in their said books; and, according to the best information which they can obtain, shall particularly describe the same in the manner following: in the first column they shall enter the name of the person, who, by himself, or his tenant, has the freehold in possession; in the second, the place of his residence; in the third his estate, that is, whether for life, or in fee; in the fourth, the number of lots in any town; in the fifth, the name of the town in which they are situated; in the sixth, the yearly rent of the lots; in the seventh, the amount of tax upon the lots at the rate of taxation ascertained by law; in the eighth the number of acres of land; in the ninth, the description of the land as to the water courses, mountains, or other notorious places, on which or near to which it lies, other lands which it adjoins, and the number of the tract, if any; in the tenth, its distance and general bearing from the court house of the county; in the eleventh, the rate of the land per acre; in the twelfth the total value of the land; in the thirteenth the amount of the tax on the whole tract at the rate of taxation prescribed by law; in the fourteenth, the total amount of taxes on

lots and lands; in the fifteenth, all alterations made since the preceding year shall be particularly noted and explained, showing distinctly for what reason and upon what authority each alteration has been made.

17. In any case where a tract of land, charged with taxes in one county, lies partly in that county and partly in another, it shall be lawful for the sheriff of the county in which the land is so charged to distrain on that part of the land lying in the other county, in the same manner as if such part was actually in his own county.

18. The sheriff, whenever he shall return any land delinquent, for the non-payment of the taxes due thereon, shall distinctly set forth, that he could find no property within his bailiwick belonging to the person charged with such taxes; and that, after diligent enquiry, he could either not find any property on the land liable to distress, or could not ascertain the land so charged.

19. The form of his return shall be as follows:

List of delinquencies in the land tax, in the county of ———, for the year.

| Name of Person. | Residence. | Estate Held. | Quantity of Land. |
|---|---|---|---|
| Description and local situation of land. | Distance and bearing from court house. | Amount of tax. | Why returned delinquent. |

20. At the foot of such return, he shall take and subscribe the following oath or affirmation, such oath or affirmation to be taken before any justice of the peace, and certified by him:

I, A. B., sheriff, (or deputy sheriff, as the case may be,) do solemnly swear (or affirm) that the foregoing list of delinquencies in the land tax in the county of ———, for the year —— is, as I do verily believe, correct and just: that I have received no part of the taxes therein returned delinquent; and that I have made diligent enquiry, for the purpose of finding property within my bailwick, liable to distress for the said taxes, but have found none.

A. B., sheriff of ——— county,

(or D. S. for ———, sheriff of —— county.)

24 The sheriff shall add to the principal sum of arrearages on each tract, ten per centum, as damages for the want of punctuality in the payment; and for the collection of these arrearages and

damages, he shall have the same power of distraining and selling personal property, as for the collection of other taxes on land. He shall, moreover, at the May, June and July term of the county court of his county, advertise a sale of the delinquent lands, at the door of the court house, in the following form:

Notice is hereby given that at the next August court of ——— county, at the court house thereof, I shall sell at public auction, for cash, so much of all the lands and lots in that county, returned delinquent for the non-payment of the taxes of the last year, as will be sufficient to discharge the arrears of taxes which shall then remain unpaid, for that year, and ten per centum damages thereon, together with the taxes of the present year. The sales will commence on the first day of the court, and continue from day to day, until they shall be completed.

The subscriber is authorized to receive all such taxes and damages at any time before the land shall be sold. A list of delinquencies may be seen in the clerk's office of the county, in possession of the subscriber, or in the office of the auditor of public accounts.

A. B., sheriff of ——— county,
or A. B., deputy for ——, sheriff of ——— county,
—— day of ———.

25. A copy of this advertisement shall also be published, at least once in every week for two months preceding the time of sale, in some newspaper printed in the city of Richmond.

26. The sheriff shall annex, to his advertisement at the door of the court house, a copy of his list of delinquencies: and, for his trouble and expenses in setting up and publishing the advertisement aforesaid, he shall be allowed the sum of three dollars, to be paid out of the public treasury: and shall also be allowed the expense of publishing such advertisement.

27. In pursuance of said advertisement, the sheriff shall accordingly sell so much only of each tract of land and lot within his county, returned delinquent for the preceding year, as will be sufficient to discharge the arrears of taxes for the year which then remains unpaid, with ten per centum damages thereon, and the taxes due for the year in which the sale shall take place.

28. The sheriff, on behalf of the Commonwealth, shall execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth, particularly and truly, the amount of the

purchase money; but the deed shall contain no warrenty; nor shall the Commonwealth be in any manner answerable for the title, or liable to refund the purchase money for any defect of title, or irregularity, or error of any kind in the proceedings. For executing the deed, the sheriff shall be allowed one dollar, to be paid by the purchaser.

30. If no person shall agree to give for any tract of land or lot so exposed to sale, the amount of taxes and damages for which it is hereby directed to be sold, the title to such tract of land or lot, shall be thereupon vested in the president and directors of the literary fund in the same manner as if they had been purchasers thereof at the sale, and as if the sheriff had executed to them a deed therefor; and the taxes due thereon shall be extinguished. Such lands or lots, while they remain the property of the literary fund shall not be chargeable with tax.

This is the last act to which I desire to call attention, in Appendix IV.

The next statute to which I call attention is found in volume 2nd of the Revised Code of Virginia, of 1819, page 15. This act is entitled:

"*An act reducing into one, the several acts, prescribing the mode of ascertaining the taxable property within this commonwealth, and of collecting the public revenue.*"

[Passed March 6, 1819.]

Sections *sixty-two, sixty-five, sixty-six, and sixty-eight*, of this act provides for the collection of the taxes assessed under the provisions of this act, and are all of it that I deem necessary to insert here. They are as follows:

"62. It shall be the duty of every sheriff and collector within this Commonwealth to proceed to collect all taxes imposed by law on lands, slaves and other property, agreeably the lists taken and returned by commissioners of the revenue, commencing on the first day of *June*, and they may be distrained for on the first day of *July* next succeeding. And the sheriffs and collectors shall on or before the first day of *November*, in each year, pay into the treasury all taxes to be by them collected in each and every year; allowing, however, to every sheriff or collector, whose county court house is more than one hundred and fifty miles from the

seat of government, one day after the said first day of *November*, for every thirty miles of such excess."

"65. In case payment be not made by any person, chargeable with any tax, levy, fine or forfeiture or amercement, the sheriff or collector shall have power to distrain the slaves (if other sufficient distress can not be had), goods or chattels which shall be found upon the lands, notwithstanding such slaves, goods or other chattels shall be comprised in any deed or mortgage; but he shall make or take no unreasonable seizures or distress, upon penalty of being liable to the action of the grieved, grounded upon this act, in which action the plaintiff shall recover his full costs, although the damage given may not exceed seven dollars. Nor shall he sell any other right or title in any slave, goods or chattels so distrained, than the person charged with such tax hath therein.

66. And, in the collection of taxes due upon lands, the sheriff shall be authorized to distrain any personal property in his bailiwick, belonging to the person to whom such taxes are charged, or any personal estate on the land in possession of such person, his tenant, or any other claiming title by, through or under him: *Provided*, That the property of any person in possession of any part of a tract of land or lot, the whole of which stands charged to another, having a free-hold title of record to that part, derived by, through or under that other, shall not be liable to distress for any taxes, on the residue of the land, having accrued subsequent to the date of such record; *And provided also*, That the sale of any personal property distrained upon the land, for taxes due thereon, shall convey only such title as the owner or occupier of such land held in such personal property."

"68. If the owner of the property so taken shall not pay such tax, levy, fine, forfeiture, or amercement, within five days after such distress, such sheriff or collector shall and may lawfully sell the same, or so much thereof as may be sufficient to discharge the said taxes, and the charges of distress and sale."

From 1819 to 1827, five several acts were passed by the General Assembly of Virginia, the first in 1820, and the last in 1827, extending the time in which the privilege was allowed the former owners of lands, which had been for any cause forfeited, to redeem them by paying the taxes, etc., due thereon. But very few, if any of these delinquents availed themselves of the privilege this ex-

tended to them. And finally, when "good words and gentle means" failed to induce these *tax dodgers* to discharge their duty to the State, the General Assembly finally concluded to try what virtue there *was in stones*, and they commenced the policy of closing them out by the Act of 1831, which follows:

On April 1st, 1831, an act was passed by the General Assembly of Virginia, as follows:

"*An act concerning lands returned delinquent for non-payment of taxes, and making disposition of certain lands so delinquent, and of certain escheated lands, for the benefit of bona fide holders thereof under grants from the Commonwealth.*"

This act, while not specially providing for the *collection* of taxes, has an especial bearing on the power of the legislature in providing for the forfeiture of the lands of delinquent tax payers. So far as I deem it necesrary to quote this act, it is as follows:

"1. *Be it enacted by the General Assembly*, That all lands except such as shall be hereinafter excepted, which having been returned delinquent for the non-payment of taxes therein, were vested in the president and directors of the literary fund, by the act passed the ninth day of February, one thousand eight hundred and fourteen, entitled, 'an act concerning taxes on lands,' and which snall not have been redeemed before the first day of January last past, in pursuance of former laws allowing such redemption, and prescribing the manner, terms and times thereof, shall forever hereafter be irredeemable.

2. And all lands, except such as shall be hereinafter excepted, returned delinquent for the non-payment of taxes thereon for the year one thousand eight hundred and twenty, or for any year or years previous thereto, and which shall not have been heretofore redeemed, or otherwise exonerated from arrears of taxes due thereon, in pursuance of former laws, allowing such redemption or exoneration, and prescribing the manner, terms and times thereof, or shall not be redeemed before the first day of January next, in pursuance of the provisions of this section hereinafter contained; and all lands, except such as shall be hereinafter excepted; which, after having been sold for arrears of taxes due thereon, have been redeemed by the executive, in pursuance of the act passed the twentieth day of February, one thousand eight hundred and seventeen, entitled, "an act to amend the several acts concerning arrearages

of taxes on lands, houses and lots," and which shall not have been heretofore redeemed, by or for the original proprietors, by payment into the treasury of the monies paid by the executive for the redemption thereof, with the damages thereon according to law, or shall not be redeemed before the first day of January next, in pursuance of the provisions in this section hereinafter contained, shall be, and the same are hereby declared to be, from and after the said first day of January next, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons, in whose name or names the same were returned delinquent for non-payment of taxes thereon, and of all and every person or persons, in whose name or names the same were returned delinquent for non-payment of taxes thereon, and of all and every person or persons claiming under them, shall be thenceforth, and the same are hereby absolutely vested in the president and directors of the literary fund. And further time until the said first day of January next, is hereby allowed for the redemption of all such lands in this section above mentioned, by payment into the treasury of all arrears and taxes due thereon, or of the money so advanced by the executive for the redemption thereof, as the case may be, together with damages on such arrears, or on the monies advanced by the executive, as the case may be, according to the provisions of the former laws concerning the same, respectively.

3. And all lands, except such as shall be hereinafter excepted for any year or years subsequent to the year one thousand eight hundred and twenty, and previous to the passing of this act, and which have not been heretofore redeemed, or otherwise exonerated from arrears of taxes due thereon, in pursuance of former laws allowing such redemption and exoneration, and prescribing the manner, terms and times thereof, and upon which all the arrears of taxes that have heretofore accrued, with ten *per centum per annum* damages thereon, shall not be paid into the treasury, upon warrant of the auditor of public accounts, before the first day of November, which shall be in the year one thousand eight hundred and thirty-three, shall be, from and after the last mentioned date, and are hereby, absolutely forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest to and in the same, of all and every person or persons in whose name or names the same are or were returned delinquent for non-payment of taxes thereon, and of all and every

person or persons claiming under them, being so forfeited, shall be, from and after the last mentioned date, and are hereby, vested absolutely in the president and directors of the literary fund.

4. And in case any lands, except such as shall be herein-after excepted, shall hereafter be returned delinquent for non-payment of taxes thereon, and the person or persons in whose name or names the same shall be so returned, or some other person for him or them, shall fail for three years, to be computed from the last day of December of the year for which such taxes shall accrue and be in arrear, to pay into the treasury, upon warrant of the auditor, the amount of taxes justly due thereon and in arrears, with *ten per centum per annum* damages thereon, from the date when the same accrued; all such lands so returned and remaining delinquent for the non payment of taxes, shall be, from and after the expiration of the said term of three years, and the same are hereby declared to be forfeited, and shall be thenceforth forever irredeemable; and all such lands, and all right, title and interest in or to the same, of all and every person or persons, in whose name or names the same shall be returned delinquent for non-payment of taxes due theron, and of all and every person or persons claiming under them, being so forfeited, shall be, from and after the expiration of the said term of three years, and the same are hereby vested absolutely in the president and directors of the literary fund: *Provided*, that in all cases of lands returned delinquent and forfeited for non-payment of taxes, and heretofore vested by law in the president and directors of the literary fund, as well as of lands which have been or shall be returned delinquent for non-payment of taxes, and which shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said president and directors, as were, or shall be vested in the person or persons in whose name or names such lands have been, or shall be, returned delinquent, and in the heirs, devisees or purchasers claiming under such person or persons, at the time such lands were heretofore, or by force of the provisions of this act, shall be forfeited, and vested in said president and directors: *And provided*, That in all cases of lands, which having been returned delinquent for non-payment of taxes, have been heretofore vested by law in the president and directors of the literary fund; and of lands, which having been returned delinquent for non-payment of taxes heretofore accrued, shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said president and direc-

tors; and of lands which shall hereafter be returned delinquent for non-payment of taxes hereafter to accrue, and which shall be, by force of the provisions of this act, forfeited for that cause, and vested in the said president and directors; if the person or persons in whose name or names such lands have been heretofore returned delinquent and vested in the said president and directors, were, at the date of such forfeiture declared, and still remain, under disability of infancy, coverture, insane mind or imprisonment; and if the person or persons, in whose name or names such lands, as shall be, according to the provisions of this act, forfeited and vested in the said president and directors, and have been returned delinquent, are now under any of the said disabilities; and if the person or persons, in whose name or names, such lands, as according to the provisions of this act shall or may be hereafter forfeited and vested in the said president and directors, shall be returned delinquent, shall be, at the date of such forfeiture, under any of the said disabilities; in such case, it shall and may be lawful for such person or persons to redeem such lands, by payment into the treasury, upon the warrant of the auditor, of all arrears of taxes justly due and chargeable thereon, with *ten per centum per annum* damages on the same, from the time or times when the taxes accrued or shall accrue, within two years next after their respective disabilities removed, and not afterwards; and if such person or persons shall die in any such state of disability, then the heirs or devises of such person or persons so dying, may in like manner, and in like terms, redeem such lands within two years after the death of his, her or their ancestors or devisors. *And provided*, That nothing in this act contained shall be construed to annul, impair or in any wise affect the rights of any purchaser or purchasers of any lands heretofore forfeited for non-payment of taxes, sold in pursuance of any former law; but all such rights shall continue to be regulated and determined by the former laws relating to them, as if this act had never been passed."

These sections contain all of this act to which I desire to call attention.

On March 10th, 1832, an act was passed entitled,

*An act concerning delinquent and forfeited lands, and to provide for the sale of lands returned delinquent hereafter for the non-payment of taxes.*

Sections *eleven* to *fifteen*, inclusive, of this act provide as follows

"11. The sheriff or collector of the revenue tax shall, at the August or September term of his county or corporation court, return to the said court a list of all lands and lots (other than those not ascertained as aforesaid, or are improperly placed thereon) within his county or corporation, which are delinquent for the non-payment of the taxes due thereon; and shall distinctly set forth, that he could find no property in his bailiwick belonging to the person charged with such taxes: and that, after diligent enquiry, he could not find property on the said land or lot liable to distress, sufficient to satisfy the taxes due thereon; which list shall be in the following form:

*List of lands and lots within the county of , delinquent for the non-payment of the taxes due thereon for the year ,*

| Name of person. | Residence. | Estate held. | Quantity of land. | Description and local situation of land. | Distance and bearing from Court house. | Amount of taxes. | |
|---|---|---|---|---|---|---|---|
| | | | | | | Dollars | Cents. |

At the foot of the return made in manner aforesaid, the sheriff or collector shall, in open court, make and subscribe the following oath or affirmation: "I, A. B., sheriff (or deputy sheriff as the case may be) do solemnly swear (or affirm) that the lands and lots contained in the above list, are delinquent for the non-payment of taxes due thereon for the year : that I have received no part of the taxes therein returned delinquent, and that I have made diligent enquiry for the purpose of finding property within my bailiwick liable to distress for the said taxes, but have found none. So help me God.

A. B., sheriff of county

Or C. D., deputy sheriff for A. B., sheriff of county."

The court of the said county or corporation shall examine the said list, and being satisfied that it contained the truth, shall direct their clerk to certify the same to the auditor of public accounts, and to preserve the original in his office; and the said clerk shall make out a fair copy of said list and verification, which he shall deliver to the sheriff or collector who returned the same. The said sheriff or collector shall make out three fair copies of said list and verification, and shall, within ten days after making said return,

set up at the courthouse door of his county or corporation, one copy of said return; and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county or corporation, and shall subjoin to each return a notification, that unless the taxes charged upon the lands and lots in the said list mentioned, shall be paid on or before the day of sale, that the said lands and lots, or so much thereof as shall be sufficient to satisfy the taxes due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same, will, on the first day of the next September or October court, at the courthouse of the said county or corporation, be sold at public sale.

12. The said sheriff or collector shall, pursuant to his notification, proceed on the first day of the aforesaid September or October term of his county or corporation court, before the front door of the said court-house, to offer for sale each and every tract of land and lot in the said list mentioned, and by him advertised for sale, on which the taxes due thereon had not been paid, or so much of each and every tract of land and lot separately, as will satisfy the taxes due thereon, and the commission as aforesaid to the sheriff or collector. And the said sheriff or collector, not having time to complete the sale of the said lands and lots may continue his sale from day to day, for five days, without the intermission of a day, (Sundays excepted,) until such sales shall be completed.

13. The sale of the said lands shall be of each entire tract, separately, or of such quantity or part thereof as shall be sufficient to discharge the taxes charged thereon, with five per cent to the sheriff or collector. When less than the entire tract of land shall be sold, the quantity sold shall be laid off in the manner hereinafter provided, at the expense of the purchaser, his heirs or devisees. And in the sale of lots, the sale shall be of each entire lot, or of such undivided interest therein, to be held by the purchaser, his heirs or devisees, as tenants in common, as shall be sufficient to discharge the taxes charged thereon, with five per cent. to the sheriff or collector.

14. Any lands or lots being offered for sale, for the non-payment of the taxes charged thereon in the manner aforesaid, and no person present bidding for the said lands or lots the amount of the taxes charged thereon, the sheriff or collector shall purchase in the same, in behalf of the Commonwealth, for the amount of the taxes charged thereon, and they shall be vested in the Commonwealth for

the use and benefit of the literary fund, in the same manner as if conveyed by deed.

15. The sheriff or collector, on receiving from the purchaser the amount of the purchase money, shall grant to the purchaser a receipt for the same, after the following form:

*List of land sold for the non-payment of the taxes charged thereon, in the county of ——, for the —— year ——, this —day of ——, eighteen hundred and——*

| Name of the person charged with the taxes. | Qunantity of land charged. | Local description of land. | Amount of taxes due. | Name of purchaser. | Quantity purchased. | Amount of purchase money. |
|---|---|---|---|---|---|---|
| | | | | | | |

Received of the above sum of , it being the amount af purchase money for the above land, sold for the non-payment of taxes due thereon for the year , pursuant to an act of assembly in that ease made and provided.

A. B., sheriff of caunty,

Or C. D., deputy sheriff for A. B., sheriff of county.

(Necessary affidavit attached.)

And now I come to one of the most important acts of all the series, passed February 27, 1835, entitled:

"*An act further to extend the time of redemption of lands and lots returned delinquent for the non-payment of taxes west of the Alleghany mountains and for other purposes.*

1. *Be it enacted by the General Assembly*, That further time shall be allowed until the first day of July, eighteen hundred and thirty-six, for the redemption of all lands and lots heretofore returned as delinquent for the non-payment of taxes, west of the Alleghany mountains, and which became vested on the first of October last in the president and directors of the literary fund, and the said redemption may be effected by payment into the public treasury of the taxes in arrears and other legal charges, on the warrant of the first Auditor, in same manner as if no forfeiture had occurred: *Provided, nevertheless*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant claiming under a junior grant, whose rights are protected and secured under the

provisions of the several acts which have heretofore passed upon the same subject, and are now in full force.

And whereas it is known to the general assembly, that many large tracts of land lying west of the Alleghany mountains which were granted by the commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years past entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

2. *Be it therefore further enacted*, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty-six, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through titles derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the commonwealth, after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted.

3. *Be it further enacted*, That all right, title and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable *bona fide* claimed, held or derived, from or under any grant of the

commonwealth bearing date previous to the first day of April, eighteen hundred and thirty-one, who shall have discharged all taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable: *Provided*, That nothing in this section contained, shall be so construed as to impair the right or title of any person or persons who have obtained grants from the commonwealth for the same land and have regularly paid the taxes thereon, but in all such cases, the parties shall be left to the strength of their original titles."

4. *Be it further enacted*, That in all cases where lands lying west of the Alleghany mountains may have been returned delinquent for the non-payment of taxes for the years 1832 and 1833, any proprietor or attorney or agent therefor may pay the taxes and damages charged upon said lands for each of those years, to the sheriff of the county where they respectively may lie, and take his receipt therefor, and deliver the same to the clerk of the county court of said county on or before the first day of November, 1836. Whereupon it shall be the duty of the clerk to erase the said lands from the delinquent lists of his county for the year or years so paid, and make out a statement of such receipts of the sheriffs so delivered as aforesaid, particularly specifying the several amounts thereof, and the lands on the delinquent lists which may have been so paid and erased as aforesaid, and transmit the same, duly certified, to the auditor of public accounts, on or before the fifteenth day of December, eighteen hundred and thirty-six, and for each tract so erased and certified, the clerk shall be entitled to a fee of twenty-five cents from such proprietor, which may be charged and collected as other fees of clerks. Whereupon, the auditor of public accounts shall, in like manner, erase such lands from the delinquent lists deposited in his office, and charge the amount of taxes and damages so certified as aforesaid by the clerk, against the sheriff so receiving, as revenue received on land, and by him to be accounted for as such. And in all controversies respecting the same, the clerk's certificate aforesaid shall be conclusive, until disproved. *Provided*, That this act shall in nowise impair any mode now existing by law for the liquidation and settlement of any such taxes and damages.

"5. *Be it further enacted*, That so much of the act entitled 'An act concerning delinquent and forfeited lands, and providing for

the sale of lands returned delinquent hereafter for the non-payment of taxes,' passed March tenth, eighteen hundred and thirty-two, as authorizes and requires lands and lots returned delinquent for the non-payment of the taxes due thereon, to be annually sold, be and the same is hereby repealed.

"6. The sheriff or collector of the revenue shall, in each year, at the September or October court of his county or corporation, return to the court a list of lands and lots within his county or corporation, which are delinquent for the non-payment of the taxes due therein, in the form and manner required by the eleventh section of the above recited act; which list it shall be the duty of the court to examine, and if satisfied of its truth, to direct the original to be preserved by the clerk in his office, and a copy thereof to be certified by him to the auditor of public accounts, who shall place the same to the credit of the sheriff or collector of the revenue.

"7. It shall be the duty of the auditor of public accounts to keep a fair record of all lands and lots returned delinquent for the non-payment of the taxes, and in the months of April, May or June, of the year 1840, and in the same months in every five years thereafter, to cause a list of the lands and lots so returned delinquent for each county and corporation (the taxes on which shall not have been paid as herinafter directed), to be delivered to the sheriff or collector of the revenue for the counties and corporations respectively, with a statement of the taxes due on each tract or lot of land, with six per centum damages thereon, for each and every year the said taxes, or any portion thereof, may have been due and unpaid, and to charge the amount of taxes and damages due on such list to the sheriff or collector of the revenue, to whom the same may be delivered. The sheriff or collector of the revenue within twenty days after receiving such list, shall make out three fair copies thereof, and set up one copy at the front door of the court house, and the other two copies he shall, within the period aforesaid, set up at two of the most public places within his county or corporation, subjoining to each copy a notification that unless the taxes and damages charged upon the lands and lots in said list mentioned, shall be paid on or before the day of sale, the said lands and lots, or so much thereof as shall be sufficient to pay and satisfy the taxes and damages due thereon, with five per centum to the sheriff or collector for his trouble in making sale of the same,

will, on the first day of the next succeeding September or October court, between the hours of ten in the morning and four in the evening, at the door of the court house of said county or corporation, be sold at public auction.

"8. The said sheriff or collector shall, pursuant to his notification, proceed to make sale of all lands and lots within his county or corporation, so as aforesaid returned delinquent for the non-payment of taxes, the taxes and damages on which shall not have been paid before the day of sale, and shall be governed in all his proceedings in making such sale, by the direction and provisions of the before recited act, entitled, 'act concerning delinquent and forfeited lands and providing for the sale of lands returned delinquent hereafter for the non-payment of taxes.' And if the sales be not finished on the day appointed in the advertisement, they shall be adjourned from day to day, during the sitting of the court, and if not then finished, be adjourned till the first day of the next court, and then proceeded in between the hours and at the place above prescribed; and if such adjournment to the next court be made, notice shall be given by advertisement at the door of the court house.

"9. The taxes and damages due upon any lands and lots returned delinquent for the non-payment of taxes, shall be and remain a lien upon said lands and lots, until the same shall be fully paid and satisfied. It shall and may be lawful for any person or persons having or claiming title to any lands or lots so returned delinquent, to pay the amount of taxes and damages due thereon into the treasury, on the warrant of the auditor of public accounts, at any time before the same shall be sold for the payment or the said taxes and damages.

"10. *Be it further enacted*, That all lands and lots which may have been sold under the before recited act, and purchased by the sheriff or collector, in behalf ot the Commonwealth, shall be embraced in the lists required to be made out by the auditor in the year eighteen hundred and forty, and shall again be offered for sale by the sheriff or collector in that year with other delinquent lands; and until the day of sale, all such lands so purchased in behalf of the Commonwealth, shall be redeemable on warrant from the auditor, by payment of the taxes and damages into the public treasury.

11. When the sheriff or collector shall have completed his sales

in the manner and at the periods prescribed by law, he shall render to the court of his county or corporation, a fair and distinct statement of his proceedings; in which statement shall be set forth the particular tracts or lots of land sold, and the amount of the purchase money, as well as such tracts or lots as shall have been offered for sale and not sold for want of bidders; and the court being satisfied of the truth of said statement, shall certify the same to the auditor of public accounts. The sheriff or collector shall account for the net proceeds of the sales, at the same period and under the same penalties prescribed in relation to the public revenue."

MARCH 23, 1836, the following act was passed, entitled:

"*An act concerning delinquent and forfeited land not heretofore entered on the commissioner's books.*

(Acts of 1835–6, ch. 3.)

Whereas, The time allowed by the second section of the act passed on the twenty-seventh of February, eighteen hundred and thirty-five, entitled, 'An act further to extend the time of redemption of lands and lots returned delinquent for the non-payment of the taxes west of the Allegheny mountains, and for other purposes,' for the owners of omitted lands to cause the same to be entered on the commissioner's books, and to pay taxes in arrear thereon, is not sufficient.

"*Be it therefore enacted:* That further time, until the first day of November, eighteen hundred and thirty-six, shall be allowed to all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the above recited act, which passed on the twenty-seventh of February, eighteen hundred and thirty-five; and the said section shall not be construed to extend to any lands or lots which may have been omitted since eighteen hundred and thirty-one.

2. In all cases where lands have been heretofore omitted, the commissioner shall ascertain the value thereof, according to the best of his judgment, by reference to the assessed value of contiguous lands similarly situated, and shall charge the tax last imposed by the legislature for as many years as the same shall have been omitted, together with ten *per centum* damages upon each year's

tax; and this rule shall apply to the eastern as well as the western section of the state."

MARCH 30, 1837, an act was passed, entitled,

"*An act to amend and explain the laws concerning western land titles and for other purposes.*

(Acts of 1836-7, ch. 8, p. 9.)

"1. *Be it enacted by the General Assembly*, That all persons whose lands have been forfeited to the Literary Fund, either for the non-payment of the taxes charged thereon, or for the failure to enter them on the books of the commissioner of the revenue, may redeem their said lands at any time before the fifteenth of January next, by paying into the treasury of the Commonwealth the amount of taxes charged thereon, with damages at the rate of ten *per centum per annum* from the time they became due; or in the case of forfeiture to enter any lands with the commissioner of the revenue, the owner may redeem them by causing such lands to be entered with the commissioner of the revenue or the sheriff of the county, in which such lands are situate, and having the same charged with all arrearages of taxes chargeable thereon, and by paying such arrearages and damages thereon at the rate of ten *per centum per annum*, into the treasury of the Commonwealth before the fifteenth day of January next: *Provided*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant claiming under a prior grant, whose rights are protected and secured under the provisions of the several acts which have heretofore passed upon the same subject, and are now in full force."

"2. *Be it further enacted*, That all lands now forfeited and vested in the president and directors of the literary fund, by virtue of the several acts of the general assembly, concerning delinquent and escheated lands, which shall not be redeemed in the manner prescribed in the first section of this act, shall be sold on the first day of August county courts in eighteen hundred and thirty-eight, for the benefit of the literary fund, in the manner hereinafter directed.

"3. *Be it further enacted*, That it shall be the duty of the circuit superior court for each county situate west of the Blue Ridge mountains, at the next fall team thereof, to appoint a commis-

sioner or commissioners, to be styled the commissioner of delinquent and forfeited lands, whose duty it shall be to ascertain and report to the next term of said courts, the quantity of delinquent and forfeited lands in his county, designating particularly the number of tracts, and quantity contained in each tract, and also the local situation and probable value of each tract, together with all information which he may be able to procure in relation to the state of the title to said lands.

"4. *Be it further enacted*, That upon the return of said commissioner it shall be the duty of said circuit superior courts of law, by orders entered of record, to direct said commissioner to make sale of the said lands in the same manner, in all respects, as in the case of other lands directed to be sold under decree of said courts: *Provided*, That no such sale shall be made elsewhere than at the court-house of the county in which the land directed to be sold is situated, nor unless public notice of the time and place of sale shall have been published in some newspaper nearest the place of sale, and posted at the door of said court-house, and at least four of the most public places in said county, for thirty days next preceding said sale. The said courts are also hereby empowered and authorized, in all cases to direct such surveys and divisions of said lands as may be deemed necessary and expedient to promote the advantageous sales of said lands, the expenses of which surveys shall be reported to the courts aforesaid, and be paid out of the proceeds of the sales of such lands. But in no case shall the commonwealth be subjected to any expense by reason of said surveys beyond the proceeds of the sale of said lands, and no survey of any such lands shall be executed unless the surveyor will consent to receive his compensation for his services in making such surveys entirely out of the proceeds of said lands.

"5. *Be it further enacted*, That all sales made by virtue of this act shall be made by the commissioner appointed as aforesaid, under the orders of the circuit superior courts of this Commonwealth, in the manner and on the terms herein mentioned. He shall require one-fourth of the purchase money in hand, and require bond with good security for the payment of the residue thereof, in twelve months from the date of sale, and he shall, moreover, reserve the title to the said lands by way of further security for the payment of the deferred installment. The said commissioner shall return a report of the sales made by him to the

auditor of public accounts, and also to the court from which he received his appointment, designating particularly the local situation of each tract, the name of the purchaser, and the price at which it was sold, and also the costs of sale; and the bonds taken for the deferred installments of the purchase money shall be returned by the commissioner to the court by which he may have been appointed, and shall have the force of judgments, and in case of the failure of the obligors to pay the amount thereof when they shall become due, it shall be the duty of the attorney for the commonwealth to move (having first given the obligors ten days notice of said motion) for an award of execution on said bonds, for which service he shall be allowed the same fees as in other motions of like kind, which shall, together with the other necessary costs and commissions attending the collection of said bonds, be taxed and included in said executions. The said commissioner shall also pay into his court all moneys collected or received by him by virtue of any such sales, and the said court shall then make an order allowing him such commissions and other reasonable expenses attending the survey and sale of said lands, as in its judgment may seem proper, and direct the residue thereof to be paid into the treasury of the Commonwealth for the benefit of the Literary Fund."

"8. *Be it further enacted*, That whenever any purchaser of any lands at any sale made under the provisions of this act shall have paid the whole amount of purchase-money by him stipulated to be paid therefor, it shall be the duty of the court by whose order the said sale was made to direct the said commissioner to convey to the said purchaser, by deed without warranty, all the interest of the Commonwealth in said lands."

MARCH 15, 1838.

On this day the General Assembly of Virginia passed an act as follows:

"*An act to amend an act, entitled, 'An act to amend and explain the laws concerning western land titles, and for other purposes.*"

1. *Be it enacted by the General Assembly*, That all persons whose lands have been forfeited for the non-payment of the taxes thereon, or for the failure to enter them on the books of the commissioners of the revenue, shall have a further time, until the first day of July next, to redeem the same, by paying into the treasury of the

Commonwealth, or to the sheriff of the county where they lie, as hereinafter provided, the amount of taxes charged, and damages thereon, at the rate of *six per centum per annum;* and in case of forfeiture for failure to enter as aforesaid, by causing such lands to be entered on the books of the commissioners as aforesaid, and having the same charged with all arrearages of taxes chargeable thereon, at the rate of *six per centum per annum*, into the treasury, or to the sheriff aforesaid; *Provided*, That such redemption shall in nowise affect the claim or title of any *bona fide* occupant whose rights are proteced and secured by any pre-existing law."

This extension of time to July 1st, 1838, for the redemption of lands previously forfeited, was the last date to which this privilege was extended. The 7th Section of the act related to the duties of the auditor of public accounts, the register of the land office and clerk of the general court to furnish information to the commissioners of delinquent and forfeited lands to assist them in the performance of their duties, and I deem it unnecessary to insert it here.

Sections 8 and 9 of this act are as follows:

"8. *Be it further enacted*, That when any tract of land so liable to be sold lies partly in more than one county, the same shall be reported, and sold by the commissioner or commissioners of the county in which the greater part may lie: and in the event it shall appear after the sale that the greater part shall not lie in the county where the sale shall have been made, the validity thereof shall not in any wise be affected thereby.

"9. *Be it further enacted*, That upon the payment of the purchase money by the purchaser, it shall be lawful for the commissioner to receive the same, first deducting the interest thereon at the rate of six *per centum per annum* from the time the same shall be paid until the time the same would become due and payable by the terms of the sale, and thereupon the purchaser shall be entitled to his deed for the land so purchased and paid for, upon application to the said commissioners, but without warranty."

The following sections down to and including section 16, are omitted: there being nothing in them pertaining to the matter in controversy. But sections 17 and 18, and the preamble thereto, being of especial importance in this case, I insert them here, as follows:

PREAMBLE.

"And whereas, James Swan, late of the city of Boston, died seized of various tracts or parcels of land in this commonwealth, lying west of the Allegheny mountains, which have been forfeited to the president and directors of the literary fund, or to the commonwealth; and whereas, the said James Swan, by his last will and testament, did direct that his estate, real and personal, should be first charged with the payment of his just debts, which estate, the personalty being of no value whatever, is wholly inadequate to the liquidation thereof; and whereas, it is represented to the general assembly that the debts of the said estate are chiefly due to the officers of the French Army who were in the American service during our revolutionary struggle, or the descendants of such officers, and originated in France after that period by loans and advances made under the promptings of a generous regard for an American citizen and a fellow soldier; and whereas, the heirs of James Swan, impressed with the obligations of their ancestors to the said creditors, released to them all their interest in said estate, and the creditors, in order to realize some portion of the amount due thereon, have placed the subject in the hands of John Peter Dumas, whose agent now here, believing the interest of the creditors will be consulted by abandoning the lands aforesaid if the taxes and damages thereon shall be exacted for their redemption, appeals to the liberality of the general assembly for their remission; therefore

"17. *Be it further enacted*, That all the right, title and interest of the commonwealth or of the president and directors of the literary fund, to any of the lands owned by James Swan, under title, legal or equitable, lying west of the Allegheny mountains and which have been forfeited to the commonwealth, or said literary fund, for the non-payment of the taxes thereon, or for failure to enter the same on the books of the commissioner of the revenue, and having the same charged with all taxes chargeable thereon, and paying the same, with damages, as prescribed by law, shall be, and the same is hereby transferred to and vested, except as hereinafter excepted, in John Peter Dumas, in trust, for the use and benefit of the creditors of James Swan, discharged from all taxes and damages charged and chargeable thereon, before the first day of January, eighteen hundred and thirty-eight."

"18. *Be it further enacted*, That the said John Peter Dumas

shall be authorized to hold the said land for the use and benefit aforesaid, and that any sale made by him, or his legally constituted attorney in fact, of any part or parcel thereof, shall be valid and sufficient to convey the title with which he is hereby invested; *Provided, however*, That nothing in this or the preceding section shall in anywise affect the right or title of any *bona fide* occupant, whose rights are secured by any pre-existing law."

James Swan, at the time of his death, had paper title to more than two millions of acres of land, lying West of the Alleghany mountains, of which fact the members of the General Assembly of Virginia were wholly ignorant. Even the men who worked the scheme were probably without any definite information as to the vast quantity of land owned by him. "The language of the preamble is: "And whereas, James Swan, late of the city of Boston, died seized of *various tracts* or parcels of land lying west of the Alleghany mountains," etc. In 1838, and previous thereto, no local taxes were levied on lands; they being only taxed for State purposes, and very lightly at that. A tax of one cent an acre at that time, would probably have paid the whole of the taxes and damages then due on the lands. I remember well when this act was passed, and when its passage became known to the people west of the Allegheny mountains, it was donounced all over West Virginia, as an infamous swindle. But the preamble also says: That these lands "have been forfeited to the president and directors of the Literary Fund, or to the Commonwealth." And now, as we have seen, lands were forfeited both to the president and directors of the Literary Fund, and to the Commonwealth, for the non-payment of the taxes thereon, and for the failure of the owner to have them entered for taxation on the land books of the commissioner of the revenues, prior to, and at the time of the passage of this act. I am utterly unable to see how the forfeiture of the lands of Swan, including the tract in controversy, *is* constitutional, and all the other ~~lands~~ laws of Virginia and West Virginia are *unconstitutional*, which forfeit lands for the same causes. And I submit, with the utmost confidenee, that it is no answer to this question to say that this act was passed before the adoption of the fourteenth amendment to the Constitution of the United States. The legislature of Virginia, had no more right or power to deprive the heirs of James Swan of their property without due process of law, before the adoption of that amendment than since. The *fifth* amendment to the Constitution of the United States, among

other things, provides that: "No person shall * * * * * be deprived of life, liberty, or property, without due process of law." And while it is well understood that this amendment did not operate upon the States but upon the United States, alone, we shall see hereafter, that the Congress of the United States passed statutes which did deprive persons of their property without due process of law, if the contention of the counsel of the plaintiff *in error* is sustained in this case.

I now pass to the Code of Virginia of 1849, which was the first regular codification of the laws of Virginia, ever made. Chapters 35, 36, and 37, of the Code provided for the assessment of taxes, the collection of taxes and the mode in which lands returned delinquent for taxes since March 1832, should be sold for taxes, or vested in the commonwealth, in the order stated. And no material changes were made by these chapters in the laws regulating these matters, from what they previously had been.

In 1860, a second edition of this Code was prepared and published by the authority of the General Assembly of the commonwealth, as it had been amended up to that time. And this edition is generally referred as "The Code of Virginia of 1860." (See pages 12, 18 of this brief.)

And this edition of the Code of Virginia was used by the revisors of the Code of West Virginia of 1868, and by the committee on revision of the two Houses of the Legislature, in the preparation of that Code for the action of the legislature of the State which adopted it. I have that copy of 1860, used by us (the committee on revision) with the notes and references of Daniel Lamb, Esq., one of the revisors of the Code of West Virginia, in my library. This edition of the Code of 1849 was the one used in Virginia from 1860 to 1863, when West Virginia became an independent State of this Union, and the Code of West Virginia was founded upon it.

The counsel of the plaintiff *in error*, on pages 16, 17, 18, of his brief, copies *fourteen* sections of chapter 29 of the Code of West Virginia on assessments, commencing with section 8 and ending with section 77. By this chapter as adopted in 1868 the assessor made out the land books as well as the personal property books, but in a large portion of the State the assessors elected were so utterly incompetent for the work of making out the land books, that the legislature in 1883 amended section 8 of this chapter by requiring the land books to be made out by the clerk of the county court, as copied by the counsel on page 16 of his brief. But the

clerk was wholly dependent on the work of the assessor to enable him to discharge this duty. And the counsel, for reasons best known to himself, left out section 35 of this chapter which shows how and when the clerk obtains the necessary information which enables him to discharge this important duty. This section reads as follows:

"35. Each assessor, before making out his land book, (and when he takes the list of taxable personal property,) shall carry with him the book of the preceding year, and the entry of lands charged to any person resident or having an agent within his district shall be shown to such person or his agent, who may be required to state on oath whether the same be correctly entered; whether any part thereof ought to be transferred to any other person, and if so, to whom, and the nature of the evidence to authorize such transfer; also, to state whether any other land within the district ought to be charged to such resident or non-resident, and to describe the same, as well as to give a description of any land charged to such resident or non-resident which is not correctly entered. And the assessor shall make such use of the information so obtained as he can properly make consistently with the other provisions of this act. Any such resident or agent failing to comply with such requisition shall forfeit fifty dollars. Any assessor failing to comply with this section shall forfeit twenty dollars."

"Sec. 77. The assessor shall deliver to the clerk of the county court the land book used by him in making his assessments, together with the statements and corrections made therein, or appended thereto, and said clerk shall make three fair copies of the land book, and when the same are completed he shall, with such assistance as may be necessary, compare each copy thereof with the land book of the preceding year, and when necessary, shall examine the records of his office and such transcripts, abstracts or statements from other officers as may be therein or in the possession of the assessor. He shall point out to the assessor, whose duty it shall be to attend at the office of said clerk when required, such errors, if any, as in his opinion exist in any of the books, and correct the same; but if the assessor does not concur as to the propriety of such correction, the matter shall be submitted to the prosecuting attorney for the county, and they shall conform to his decision."

If Robert E. Randall, trustee, had discharged his duty under his

so-called decree of redemption, and caused the land to be entered, valued and assessed with taxes as required by ~~section 32 of said chapter 29 (See p. ——— of this brief)~~ the assessor could and would have performed his duty, and the clerk could and would have entered this tract of land and charged it with taxes as the law required him to do. But as Randall failed to perform *any part* of his duty in the premises, neither the assessor nor the clerk could perform theirs. And so the land still remains off the land books of each and all the counties in which any part of it lies. And three years after his said redemption he resigned his office as trustee, and John R. Reed was appointed in his place.

Chapter 29 of the Code of West Virginia provides very carefully for the assessment of all the personal property in the State, not exempt from taxation, in each and every year, but not for the assessment of real estate.

There never was a general law, either in Virginia or West Virginia, for the annual assessment of taxes on real estate. And prior to the formation of the State of West Virginia, a re-assessment of the real estate in all the counties of Virginia was made periodically, under special laws passed by the General Assembly, for the purpose, at intervals of about ten years apart. And West Virginia still pursues that course in the re-assessment of real estate for taxation.

The last act of the legislature of West Virginia, providing for a re-assessment of the lands throughout the State, was passed February 27, 1891, and is found in the session acts of that year, commencing on page 60.

Sections *one, two and seven* of said act are as follows:

"1. The board of public works shall appoint one commissioner for each assessment district in the several counties of this State, who shall be a resident freeholder of such district, and who shall not be a land broker or speculator in lands, whose duty it shall be to reassess the value of all real estate therein.

"2. Each commissioner so appointed shall within thirty days after notice of his appointment execute a bond with security in the penalty of three thousand dollars, conditioned for the faithful performance of his duties, to be approved by the county court, or the clerk thereof in vacation, with two or more good securities, and shall take an oath to support the constitution of the United

States and the constitution of this State, and that he will faithfully and impartially discharge the duties of his office to the best of his skill and judgment, and that he will neither directly nor indirectly receive nor agree to receive any gift or reward, from the owner of any land in his assessment district or other person, to influence his action in the making of such assessment, and that he will assess all the real estate in his district without bias, fear or favor. The said bond and oath shall be filed in the office of the clerk of the county court, and the bond be duly recorded, by said clerk, who shall certify a copy thereof within ten days thereafter to the auditor, and also furnish the auditor the postoffice address of the commissioners. If the said commissioners so appointed shall fail to qualify and give bond as herein required, within the time prescribed, or in case he shall die or resign, before making or completing his revaluation, or the office otherwise become vacant, a successor shall be immediately appointed by the board of public works, who shall at once give bond and qualify as herein prescribed, and enter upon the duties of the office."

7. Any person feeling himself aggrieved by the assessment of his real estate or other property, as herein provided for, made under the provisions of this act, may, within one year after the filing of a copy of such assessment with the clerk of the county court apply, by himself or his agent to the said court for redress, first giving reasonable notice in writing of his intention to the prosecuting attorney, and stating in such notice the character of the correction he desires. It shall be the duty of the prosecuting attorney, upon being so notified, to attend to the interests of the state at the trial of such application. If upon hearing the evidence offered, the county court shall be of opinion that there is error in the assessment complained of, or that the valuation fixed by the commissioner is too high or too low, the said court shall make such order correcting the said assessment as is just and proper. The right of appeal from any such order made by the county court shall lie to the circuit court, and may be taken either by the applicant or the state, and in case the applicant, or the state by its prosecuting attorney or agent desires to take an appeal from such order, the party desiring to take such appeal shall have the evidence taken at the hearing of the application certified by the county court and such appeal, when allowed by the court or judge in vacation, shall have precedence over all other cases pending in such court. A copy of any order or orders entered in any court, mak-

ing any such corrections as is herein provided for shall be made and certified to the auditor by the clerk, within twenty days after the entering of the same; such application shall have precedence of all other business before the court; but any order or judgment made upon such application shall show that the prosecuting attorney was present and defended the interest of the state, and in the event it shall be ascertained that the land has been assessed too high, and the owner has paid the excess of such taxes, the court shall order that the excess shall be refunded to him and if not so paid he shall be relieved from such excess. No costs of such application shall in any event be taxed against the state, but if the applicant fail to obtain any relief upon the hearing of his application, he shall be taxed with the costs of the officers of the court incurred therein, otherwise no costs shall be taxed against such applicant."

A provision similar to this has always been inserted in every act for the re-assessment of real estate of which I have any knowledge, in both States.

The "other property" referred to in the preceding section, has reference to that part of section 4 of the act which reads as follows: "And when mineral, mineral water, oil, gas, or coal privileges or interests, are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties, company or association, at its cash or market value at the time of such re-valuation."

Chapter 37 of the Code of Virginia as amended in 1860 provides fully for the sale and conveyance of lands returned delinquent for the non-payment of taxes by individuals, but says nothing in regard to lands forfeited for non-entry on the land books, and there are but two sections of that chapter to which I desire to call attention. These sections are 24, 25, and read as follows:

"24. When any real estate is offered for sale as aforesaid, by the sheriff or collector, and no person present bids the amount to be satisfied from the sale thereof; the sheriff or collector shall purchase the same on behalf of the Commonwealth for the taxes thereon, and the interest on the same, and its proportion of the expense of advertising. A list of the real estate so purchased by the Commonwealth shall be made out by the sheriff or collector. After it shall have been verified by him on oath, the court of his county or corporation shall direct its clerk to make out a copy thereof and deliver it to the commissioner of the revenue, and

shall cause the original list to be certified to the first auditor. Such copy and list the clerk shall deliver and certify accordingly. The list for the auditor he shall place in a sealed enclosure, directed to that officer, and deliver to the sheriff or collector. Upon receiving said list, the auditor shall credit the sheriff or collector with the amount for which said real estate may have been so purchased; but not with any commissions thereon.

"25. The first auditor shall cause all the lists received in his office under the preceding section, to be recorded in a well bound book; and all the real estate mentioned in such lists, shall, without any deed for the purpose, stand vested in the Commonwealth "

Under this chapter lands were sold for the non-payment of taxes, once in every five years. And the succeeding section gave to the former owner, among others, the right to redeem the lands so purchased for the Commonwealth until they were again offered for sale at the next regular sales of lands forfeited to the State, as then provided by law."

And section 8, of Article XI, of the first Constitution of this Sate, among other things, provided as follows:

"8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature."

## CODE OF WEST VIRGINIA.

As already seen this Code was adopted in 1868, and it took effect July 1st, 1869.

### CHAPTER 30, SEC. 7, 8, 10.

*Of Distraining for Taxes.*

"7. Any goods or chattels in the county belonging to the person or estate assessed with taxes, may be distrained therefor after the first day of November in the year for which the taxes were assessed, or before that day if such goods or chattels are about to be removed from the country."

"8. When taxes are assessed on land partly in one county and

partly in another, the sheriff or collector of the county in which the taxes are so assessed, may distrain on that part of the land lying in the other county."

"10. No deed of trust or mortgage upon or sale of goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed, or the former owner thereof, while such goods and chattels remain in the grantor's or owner's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

Sections 18 to 24, inclusive, provides for making out and return of the list of persons delinquent for the non-payment of taxes assessed on lands and personal property, to the county court and to the auditor. And the next chapter provides what shall be done with the lands so returned delinquent.

## CHAPTER 31.

### Sale of Real Estate for Taxes; Forfeiture for Non-payment and Non-assessment of Taxes; Transfer of Title Vested in the State; Redemption Thereof.

This is a very long chapter, but the following are the only sections thereof to which I deem it necessary to call attention, viz: Sections *four*, *six*, *seven*, *thirty-one*, *thirty-two*, *thirty-three* and *thirty-nine*. These sections read as follows:

"4 On or before the first day of November, in the year one thousand eight hundred and eighty-three, and in every second year thereafter, the auditor shall cause to be delivered to the sheriff or collector of the taxes for ever county, two lists of the real estate therein, which at the time said lists are made out, shall have been returned delinquent for the non-payment of the taxes thereon for any previous year and not previously sold therefor, and on which the taxes and interest, or any part thereof, shall remain then unpaid and not released or otherwise discharged, with a statement of the several amounts due for State and State school taxes; county taxes for all purposes; school district and independent school district taxes; other district taxes for all purposes, and municipal corporation taxes for all purposes on each tract or lot for each year, with interest on each amount from the twentieth day of January

in the year succeeding that in which such taxes were levied, unti the first day of November in the year such lists are delivered as aforesaid to the sheriff or collector, at the rate of twelve per centum added thereto. But if the real estate has been sold for the non-payment of taxes, the same shall not be charged with, or again sold on account of any tax for any previous year to that for the taxes of which the same was made; except, that if for any cause a previous sale of real estate purchased by or in behalf of the State, has been or shall be set aside by the court, and the taxes for which it was or shall be sold, have not been paid, the auditor shall include in such lists all such real estate, and the same shall be sold for the taxes and interest due thereon for the years for which it was previously sold, in like manner and with like effect as the other real estate mentioned in said lists."

"6. Within ten days after receiving such lists the sheriff or collector shall make out and cause to be published, once in each week for four successive weeks, in some newspaper published in the county, prior to the day of sale, an abstract of such list, in form or effect as follows:

*Sale of Real Estate for Taxes.*

"Notice is hereby given that the following described tracts or lots of land in the county of ———, which are delinquent for the non-payment of taxes for the year (or years) 18—, will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the court house of said county, between the hours of ten in the morning and four in the afternoon on the —— day of ———, 18—. Each tract or lot, or so much thereof as shall be necessary, will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

| Name of person charged with taxes. | Quantity of land. | Local description. | Total amount of taxes, interest, costs of publication and commissions, being amount necessary to redeem before sale | Total amount of taxes, interests, costs of publication, commission and fee for receipts. |
|---|---|---|---|---|
| | | | | |

"Any of the aforesaid tracts or lots may be redeemed by the

payment to the undersigned, sheriff (or collector), before sale, of the amount due thereon.

"Given under my hand this —— day of ———, 18—,

A——— B———

Sheriff (or Collector)."

The real estate mentioned in such list, or so much thereof as shall be sufficient to satisfy the taxes, with the interest on the same, and a commission of five per cent. on the whole amount to the sheriff or collector, shall be sold at public auction between the hours of ten in the morning and four in the afternoon, on the first day of the next November or December term of the circuit or county court of said county, whichever may be held first after the posting of said list and the publication of said notice as herein required; or if no term of either court be held in said county in November or December, then on the second Monday in December next thereafter, unless the said taxes, interest and commissions are sooner paid to the sheriff or collector, or into the treasury of the State. He shall also, as soon as such abstract is published the first time in a newspaper, as herein required, post one of the copies of the list received from the auditor, on the front door of the court house, with a like notice appended thereto. If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, said sale shall be commenced on the first day of a circuit or county court for such county, whichever may be held first in the succeding year next after the publication of such notice of sale." The balance of this section relates to other matters than the sale, and is omitted.

"7. If the said taxes, interests, costs of publication and commissions be not previously paid, the sheriff or collector shall proceed to make said sale, and if the same be not completed on the day named in the notice thereof, it shall be continued from day to day (Sundays excepted) between the hours aforesaid until it shall be completed." The balance of the section relates to the suspension of the sale for reasons appearing to the sheriff and is therefore omitted.

### Lands Purchased by the State for Taxes.

"31. When any real estate is offered for sale as aforesaid, and no person present bids the amount of taxes, interest and commis-

sions due thereon, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest on the same, and shall make out a list thereof under the following caption:

"List of real estate charged with taxes and sold in the county of ——, in the month (or months) of ——, one thousand eight hundred and ——, for the non-payment of taxes due thereon for the year (or years)——, and purchased for the State of West Virginia.

Underneath shall be the several columns mentioned in the tenth section, with a like caption to each column, omitting, however, the column headed "name of purchaser." The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the State during the year ——, and return the list with a certificate of the oath attached, to the clerk of the county court within ten days after such sale, who shall within twenty days after such return record the same in a well bound book and transmit the original to the auditor. Upon receiving said list the auditor shall credit the sheriff or collector with the amount for which the real estate therein specfied was purchased, but not with any commission thereon.

"32. The auditor shall cause all the lists received in his office under the preceding section to be recorded in a well bound book, and all such estate, right, title and interest in the real estate mentioned in such lists as would have vested in an individual purchaser thereof at such sale, who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall be by the sale and the purchase on behalf of the State vested in the State, without any deed or other conveyance therefor to the State: subject, however, to the right of redemption mentioned in the next section."

"33. The previous owner of any real estate so sold and purchased for the State, his heirs or assigns, or any person having a right to charge it for a debt, may within one year from the sale thereof, redeem the same by paying into the State treasury the amount of all State, State school, county, school district, independent school district and other district taxes, and all municipal corporation taxes, with the interest due on each class of taxes at the time of such purchase, including such taxes as were or should have been assessed thereon for the year in which the same was sold

and the cost of publication of such real estate in the delinquent list, together with such additional sums as would have accrued thereon for all of such taxes if the same had not been purchased for the State, with interest thereon at the rate of twelve per cent. per annum from the twentieth day of January in the year following that in which the same would have accrued."

*Lands not entered in the assessor's books, forfeited.*

"39. It shall be the duty of every owner of land to have it entered on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year one thousand eight hundred and sixty-nine, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with a state tax on said land then by operation of law, and without any proceedings therefor, the land shall be forfeited and the title thereto vested in the State. But if for any one or more of such five years the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein, at the time of the forfeiture thereof, who shall then be an infant, married woman or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest therein, charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be chargeable on the land or interest therein for the year one thousand eight hundred and sixty-three, and every year thereafter with interest at the rate of ten per centum per annum, and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein or any part thereof: *Provided*, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited."

The balance of this section has reference to tracts of land less than 1,000 acres, and is therefore omitted.

And now it plainly appears that from 1629 to June 20, 1863, a period of 234 years, it was the *custom and usage* of Virginia to collect her taxes by distress and sale of property, and never by judicial process. And that such has been the *custom* and *usage* of West Virginia from 1863 to the present time, a period of 34 years.

And if anything *can* be established by *custom* and *usage*, as "the law of the land," this manner of collecting taxes has been so established.

And then it must be borne in mind that a State has no more right or authority to deprive any person of his personal property "without due process of law," than to deprive him of his real estate "without due process of law." And we have seen that for many years prior to 1800, real estate was distrained and sold for taxes, the same as personal estate, by Virginia.

## CODE OF WEST VIRGINIA, CHAPTER 105.

*Of the sale of land for the benefit of the School Fund.*

Section *two* of this chapter, as adopted in 1868, under our first Constitution, provided as follows:

"2. All waste and unappropriated lands within this state, and all lands in this state heretofore vested in the state of Virginia by forfeiture or purchase at the sheriff or collectors sale for delinquent taxes and not released and exonerated or redeemed according to law; all lands heretofore or hereafter purchased for this state, at a sale thereof for taxes, and not redeemed according to law; and all lands forfeited to this state for the failure to have the same entered upon the books of the assessor and charged with the taxes thereon, as provided in chapter thirty-one of this act, shall, so far as the title thereof shall not be vested in junior grantees or claimants under the provisions of said last mentioned chapter, be sold for the benefit of the school fund, in the manner hereinafter prescribed. The auditor shall certify to the recorder of each county a list of all such lands, which, or the greater part of which, lie in his county, within sixty days after the title thereto shall vest in the state."

This chapter has been several times amended, the last time on February 23, 1893. Under the Code of 1868, the proceedings for the sale of all classes of lands mentioned in said section were purely administrative, and no appeal was provided for, from any of these proceedings. As amended in 1893, the state of West Virginia is allowed to bring and prosecute a regular suit in chancery for the sale of her own lands, in order that others beside the person in whose name the land was forfeited, who claimed an interest in the forfeited lands, might have the opportunity of contesting the validity of the claims of any and all others seeking to re-

deem the land from forfeiture. I will insert here such sections of said chapter as thus amended, as will enable this Honorable Court to fully comprehend the change. These sections read as follows:

"'SEC. 1. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, transferred, or otherwise disposed of. the title whereto shall remain in this State till such sale as is hereafter mentioned be made, shall, by proceedings in the circuit court of the county in which the lands or a part thereof are situated, be sold to the highest bidder for the benefit of the school fund, in the manner hereinafter provided." This section is section *four* of article *thirteen*, of the Constitution of the State above quoted, enacted into this statute down to and including the words, "the highest bidder," the remainder of the section being added by the legislature.

"SEC. 2. A record of all real estate forfeited for any cause to the State of West Virginia under the Constitution and laws thereof, or purchased for the State at a sheriff's sale for taxes, and not redeemed or released according to law, which has or shall come to the knowledge of the Auditor, shall be kept by him in a well bound book, in his office, in which shall be stated the name of the former owner thereof, if known, and if not that fact shall be stated, the quantity or supposed quantity of such real estate, the local or other description thereof, as certified to him, for what years the owner thereof was not charged with taxes thereon, and when said real estate became forfeited. Such record shall be *prima facie* evidence that the owner of such real estate was not charged with the taxes thereon for any of the years stated therein, and that he did not cause said real estate to be entered and charged with taxes as required by law, and that such real estate was forfeited, and the title thereto vested in the State at the time specified. In order to enable the Auditor to make such record, it shall be the duty of the clerk of the county court of each county in which any such real estate ought to have been, but was not entered on the land books and charged with the taxes thereon, upon discovering any such failure, to certify the same, and all the facts in relation thereto, to the auditor; and a duplicate of such certificate shall be filed in his office and recorded in the book mentioned in section fourteen of chapter thirty-one of this code. The auditor shall certify to the

commissioner of school lands for the proper county, copies of all the certificates of any such clerk received by him within sixty days after receiving the same, except lands purchased for the state at a sheriff 's or collector's sale thereof for taxes, which shall be certified by the Auditor to the commissioner of school lands, immediately after the expiration of twelve months from the date of such purchase.

"SEC. 4. The circuit court of every county shall from time to time appoint a commissioner of school lands for such county, who shall do and perform the duties and exercise the powers hereinafter provided for. Every such commissioner shall, before entering upon the duties of his office, take an oath in open court that he will faithfully, to the best of his skill and judgment, execute the duties of his office, and shall give bond with good security, to be approved by the court, in the penalty of at least two thousand dollars, conditioned that he will faithfully and impartially discharge the duties of his office, and will pay over and account for, according to law, all moneys, bonds and other securities, which may come into his hands by virtue of his office. He shall, as far as possible, see that every officer, having any duty to perform under this chapter, performs the same as therein required, and report any failure of any such officer to do so to the circuit court of his county. The court may, whenever in its opinion it is proper to do so, require such commissioner to give a new or additional bond, as prescribed by section twenty of chapter ten of the Code of West Virginia, and all the provisions of said section, and of section twenty-one of said chapter, shall be applicable to said new or additional bond when given."

"SEC. 5. It shall be the duty of the commissioner of school lands of each county to report to the circuit court of his county from time to time, and at least once in each year, a list of all tracts and parcels of land, if any, lying in whole or in part in his county, reported to him by the auditor and surveyor as required by the second and third sections of this chapter, or which shall otherwise come to his knowledge, which in his opinion are liable to be sold for the benefit of the school fund.

"SEC. 6 Every such report shall be recorded in the chancery order book of said court, and filed and preserved by the clerk of said court in his office, and thereupon a suit or suits in chancery shall be commenced and prosecuted by and in the name of the State of West Virginia for the sale of every such tract and parcel of

land so reported, as required by section four of article thirteen of the constitution of this State. All such tracts or parcels of land mentioned in any such report, not exceeding in quantity one thousand acres, may be included in one suit, but a separate suit may be brought and prosecuted for the sale of each tract of land exceeding in quantity one thousand acres; and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same was forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or an interest in any such lands shall, also, as far as known, be made defendants therein. And any person claiming an interest in any such land or in the proceeds thereof, not so made defendant, may file his petition in any such suit, stating what interest he claims therein, either in open court or before a commissioner in chancery while the suit is pending before him, or at rules, if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interests, if he has any therein, to the same extent as if he had originally been made a party defendant therein." The balance of this section relates to other matters, which I deem it unnecessary to insert.

"SEC. 7. All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter one hundred and twenty-four of the Code, and proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the State courts of this State, except as herein otherwise provided. In all cases where an order of publication is issued, there shall be therein set out the number of tracts in which non-residents are interested as owners or claimants, with a general description as to the location and quantity of each."

"SEC. 16. The former owner of any such land, his heirs, personal representatives, or assigns, or any creditor having a lien on said land at the time of the forfeiture and still existing, shall be entitled to recover, in whole or in part, the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon since the formation of this State, with interest at the rate of twelve per centum per annum. And the costs of the suit of his claim be filed in the circuit court that decrees the sale, within one year after the sale is confirmed.

Such former owner, his heirs, personal representatives or assigns, or any such creditor may, within the time aforesaid, file his petition in the suit in said circuit court, stating in full his title to or lien upon such lands, accompanied by the evidence thereof, and upon full and satisfactory proof that at the time the title to said land, vested in the State, the said former owner had a good and valid title thereto, legal or equitable, superior to that of any other claimant thereof the court shall order the excess mentioned herein, or so much thereof, as he may prove himself entitled to, be paid to such owner, his heirs, personal representatives, assigns or creditors, as the case may be; and for the purpose of ascertaining the same, the court may refer the several matters in question to a commissioner thereof; and upon a properly certified copy of such order being presented to the auditor he shall draw his warrant on the treasury, in favor of such owner, his heirs, devisees, personal representatives, assigns, or such creditors, for such excess. And every such suit shall remain upon the docket of the court for one year after the decree confirming any sale of land therein mentioned, in order that opportunity be given for the filing of such petitions.

"SEC. 17. The former owner, his heirs, devisees or assigns, of any real estate forfeited for any cause to the State of West Virginia, may at any time during the pendency of the suit for the sale thereof, and before a decree for the confirmation thereof has been made and entered by the court, file his petition therein in manner and form as provided in the next preceding section in relation to the excess of the proceeds of such sale, praying to be allowed to redeem so much only of such real estate as to which the title still remains in the State; and upon the filing of such petition, and upon such proof being made as would entitle the petitioner to the excess of the purchase money of such real estate if the same had been sold, the court may by a proper decree, permit the petitioner upon the payment into court or to the commissioner of school lands, the costs, taxes and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in his petition. And upon such payment being made as aforesaid, the court shall enter its decree declaring the redemption of said real estate by said petioner, so far only as the title thereto is in the State, as provided in this chapter, and so far as the petitioner has shown himself entitled to redeem the same; which decree shall operate as a release of such forfeiture of said real estate to the extent declared therein, and of all former taxes and interest charged

and chargeable thereon. And such petitioner shall acquire no other title to the land so redeemed than was vested in him immediately before such forfeiture, but such redemption shall in no wise affect or impair any right, title or interest any person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of section three of article thirteen of the constitution of this State."

*Jurisdictions of Courts, &c.*

"Sec. 18. In every such suit brought under the provision of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundaries which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein; and the court, in its discretion, may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And every such issue shall be proceeded in, and the trial thereof shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant new trials therein as in other cases tried by a jury."

*Appeals.*

"Sec. 22. Appeals from and writs of error or *supersedeas* to the decrees, jugdments and orders of the circuit courts, rendered or made under the provisions of this chapter, may be had and taken and allowed as provided in chapter one hundred and thirty-five of this code, and all the provisions of that chapter, so far as applicable, sball apply to appeals, writs of error and *supersedeas* under this chapter."

And thus, it will be seen, that while the State of West Virginia still pursues the same old and uniform remedy in the collection of her taxes assessed on real estate, and forfeiting the same for the failure of the owners thereof to cause their lands to be entered and charged with taxes on the land books of the proper county or counties in which they are chargeable with taxes, by "the law of the land," and not by judicial process or proceedings, she has now provided for the sale of her own lands by a regular suit in chancery, in which the former owner of the lands, if known, and every other person known to be claimants of any interest therein, are re-

quired to be made parties defendants in such suits, with the privilege of proving their title to the land at the time of the forfeiture thereof and having the excess of the purchase money paid for the said lands at the sale thereof, if a sale be made, paid to them, or of redeeming their said lands from the forfeiture thereof by paying into courts all the charges thereon for taxes, interest and costs, as provided by the statute. And the right is given them, if they are not made defendants in the suit when brought, to appear and make themselves defendants by petition, and to defend their interest in the lands in question, the same as in any other chancery suit, and finally to appeal, as in any other case, from the final decree entered in the suit. All the State asks now of these tax dodgers is to come forward, prove their title, pay what they owe to the State, including costs, and take the lands as far as they have not already been disposed of by the State. *What more can such people ask?*

At the close of the Revolutionary War, the government of Virginia being safely seated on the James River, and having the title under her colonial charters to all the territory lying west of the Alleghany mountains and now comprising the States ef West Virginia and Kentucky, and desiring to facilitate the early and speedy settlement of that part of her said territory nearest the seat of government as a barrier against Indian raids, adopted the fatal policy of issuing and selling land warrants at the price of two cents per acre for any number of acres, large or small, the purchaser might desire, authorizing the *holder* to locate them when and where he pleased, regardless of any and all prior locations by others and to procure a plat and certificate of a survey of the land located by virtue of her warrant or warrants, and to file the same in the office of the register of the land office at the seat of government. And in case no prior locator filed a *caveat* against the issuing of a grant to him, he was, at the end of six months from the date of his survey, entitled to a grant for the land therein mentioned, and his title to the land dated from the date of his grant, regardless of all prior locations and surveys.

But it only required time and experience to demonstrate that no more fatal policy to defeat the end desired, could have been devised. Just the opposite of what was intended was the result of this policy. Rich men, citizens of other States, purchased these warrants to the extent of many millions of acres and located and pretended to have had them surveyed, to a greater or less extent, in that part of the territory now comprising a large majority of the

counties of West Virginia, and obtained grants upon plats and certificates of surveys in which, as a general thing, they were very inaccurately described, corners called for, on streams which if found at all, were often found miles away from the streams called for, and by meets and bounds which in every instance of which I have any knowledge, and they are many, were never run except to the extent of a few calls from the beginning corner. And many of them being what was always familiarly known in the country as "camp surveys" and "chimney corner surveys" commencing at some noted corner of another survey, and from this laid down entirely by protraction, without stretching a chain upon them. This course of proceeding, caused as it was, by the danger of surveying land which the Indian savages claimed as their property, naturally and necessarily resulted in the same lands, in whole or in part, being covered by several conflicting grants. There was one gentleman in Virginia, Wilson Cary Nicholas by name, and but one, so far as I have known in my practice, who dealt to a very large extent in these land warrants. The tract of 500,000 acres of land in question in this suit was entered and surveyed for William Cary Nicholas, and the plat and certificate of the survey was assigned by him to Robert Morris, of Philadelphia, who as his assignee, obtained the grant for the land. And in the same locality with the land in question, this same William Cary Nicholas entered and surveyed (in the usual way) and obtained grants for several other large surveys, one for 500,000 acres, one of 300,000 acres, one of 320,000 acres, and one of 50,000 acres. With but few exceptions, these large grants were all procured and held, mainly by non-residents, for purposes of speculation only, and not with any view to the speedy settlement of the country. And many non-residents of Virginia became the owners of these large tracts of land, by purchase, and held them for purposes of speculation only, and among them was the man James Swan, of Boston, under whom the plaintiff *in error* claims title to the 500,000 acres of land in question. Swan was engaged in working up a scheme for the organization of a great colonization association for colonizing the territory in question, and to that end he purchased the vast quantity of land above mentioned. For this purpose he went to France and made his headquarters in the city of Paris. And after a time he was charged with fraud in his transactions, and was convicted and imprisoned, and kept in prison till he died.

The legislation of Virginia down to 1838 shows how the owners

of these large tracts of land managed to defraud the commonwealth of her taxes upon them, and the patient and liberal manner in which they were treated by the legislature in extending the period from time to time, in which they might redeem the land from forfeiture, which they always and finally failed and refused to do. But Virginia continued the sale of land warrants, as aforesaid, down to 1863, when West Virginia became a State of the Union, and in her first constitution she put a stop to this traffic within her borders, and stopped the issue of grants upon warrants previously issued, except in cases where they had already been located. But the continuance of this policy of selling land warrants to persons who in good faith desired to obtain grants in small quantities of land and settle and occupy the same, resulted in thousands of men with small means entering and surveying and obtaining grants for small tracts within the boundary lines of these large surveys in utter ignornnce of that fact, and without interference by the men who claimed them. They entered upon and occupied their lands, cleared and cultivated them and regularly paid their taxes upon them, which, as a rule, the claimants of the large tracts never did. And for the protection of these occupants the General Assembly passed, comparatively, short periods of limitations to suits against these grantees of the State and made other necessary and proper provisions, including the provisions of our present constitution, for their defense and protection. And these are the persons so often referred to in these statutes, as *bona fide occupants*. And these are the persons who are stigmatized as the worst of criminals by the counsel of the plaintiff *in error*, and the mildest epithet he can find to apply to them is that of *trespassers* who have clandestinely and dishonestly sppropriated to themselves the lands of *honest* citizens of other States than Virginia, who have done nothing worse than to keep out of that State at all times when the assessor of taxes was engaged in the discharge of his duty, and thereby preventing the assessment of taxes on their lands—the location of which they have never caused to be defined, and of which the assessors were wholy ignorant, thereby defrauding the Commonwealth of her taxes on their lands from ganeration to generation ; a course of conduct on their part which seemes, in the opinion of this counsel, to have been highly commendable.

The decissions of the Court of Appeals of Virginia, to which I desire to call special attention, are as follows :

*Staats Lessee v. Baord*, 10, Grattan, 400, 402.

The decision of the court affirming the validity of the act of February 27, 1835, is very clearly expressed in the 1st and 3rd points of the syllabus as follows:

"1. Land having been forfeited under the act of the 27th of February, 1835, Sess. Acts p. 11, for the failure to enter them on the commissioner's books, that forfeiture was complete on the first day of November, 1836, the period limited in which the forfeiture might be saved by complying with the provision of the act of March 23d, 1836."

"3. The forfeiture in such case became absolute and complete by the failure to enter and pay the taxes on the land and the damages, in the manner prescribed by the act of the 27th of February, 1835. And no inquisition, or judicial proceeding, or inquest or finding of any kind was required to consumate this forfeiture."

*Wild's Lessee v. Serpell*, 10 Grattan, 405.

In this case the *first* and *second* points of the Syllabus read as follows:

"1. The statutes of Virginia forfeiting lands to the commonwealth for the failure of the owner to enter them upon the commissioner's books and pay the taxes due thereon, are constitutional.

"2. The forfeiture under these statutes is perfected without a judgment, decree, or other matter of record, or inquest of office, but by the operation of the statutes the title is divested out of owner and is vested in the commonwealth."

There was some division among the judges of the court upon minor points, but none as to the points above quoted from the syllabus. The opinion of the Court was delivered by Judge Lee, from which I quote, commencing on page 408 of the case and ending on page 410, as follows:

"That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages

as shall be found not to be released by law; and in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default, (under the modification and restrictons provided by the acts,) are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staats' Lessee* v. *Board*, *supra*, 400; *Smiths' Lessee* v. *Chapman infra; Hale* v. *Branscum*, *infra*. The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case, no judgment, or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, of their own force and by their own energy, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the commonwealth without the machinery of any proceeding of record, or anything in the nature of an inquest of office. And as the title is thus in a proper case divested out of the owner and vested in the commonwealth by the operation of the statutes, so where the forfeiture inures to the benefit of a third person claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is in like manner perfect and complete without any new grant from the commonwealth or any proceedings to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the State lying west of the Allegheny mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted, was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable.

In this case the tract of three hundred acres granted to Francis and William Derkins in December, 1785, having never been entered upon the books of the commissioners of the revenue of any county, nor charged with taxes according to law prior to the year 1839, was therefore clearly forfeited to the commonwealth under the second section of the act of February 27th, 1835, Sess. Acts 1834-5, p. 12. And this forfeiture became perfect and consumate on the 1st of November, 1836, at which period the further time given by the act of March 23d, 1836, Sess. Acts, 1835-6, p. 7, within which

the owners of delinquent and omitted lands might save a forfeiture by complying with the provisions of the act, expired by express limitation."

*Hale v. Branscum*, 10 Grattan, 418. There are but three points in the syllabus in this case, which are as follows:

"1. Land having been forfeited under the Act of 1835, Sess. Acts, p. 11, for failure to enter them in the commissioner's books, that forfeiture was complete on the 1st day of November, 1836, Sess. Acts, 1835–6, p. 7.

2. From the time of the forfeiture time will not run in favor of a party in possession against the commonwealth or those claiming under her by patent.

3. By the operation of the Act of March 5th, 1837, Sess. Acts, p. 7, the title acquired by the commonwealth by such forfeiture vested in the party obtaining a patent for the land in June, 1846."

These points exactly express the decision of the court in the case.

In the case of *Armstrong v. Morrell*, 14 Wallace, 120, decided in 1871, the three cases above referred to, all came under review by this Honorable Court. The case was brought in the District Court of the United States for the District of West Virginia, sitting with circuit powers, in Charleston, Kanawha county, and was tried and determined before Hon. John J. Jackson, who still remains the Judge of said court. The jury, under the instructions given them at the trial of the case, found a verdict for Morrill, the plaintiff, and the defendant obtained a writ of error to the judgment entered upon said verdict. I remember well the time when this case was decided in the court below, and the hue and cry that was raised by a lot of disappointed people over the instructions given by His Honor, the judge, to the jury, sustaining the validity of the Act of 1835 in the three cases decided by the Court of Appeals of Virginia above cited.

It was almost equal to the *rumpus* raised by the counsel of the plaintiff *in error* in this case, over the one instruction given by His Honor, Judge Nathan Goff, to the jury in this case. The opinion of the court in this case was delivered by Mr. Justice Clifford, in which all the Judges but three concurred, confirming the judgement of the court below. The only one of the three who filed

a dissenting opinion was Mr. Justice Strong, which made no reference to the said act of the Legislature of Virginia of 1835, nor in any way questioned the forfeiture of the land in question under it, except that on page 147 of the case, speaking of the Albert Gallatin patent, dated February 10, 1786, under which the plaintiff, claimed, he says: "It does not appear that any possession was ever taken under this patent, but on the 1st of November, 1836, the lands were forfeited to the State for the failure by the owners to make entry thereof upon the commissioners' books for taxation." Thereby showing that all the judges concurred as to the validity of the act of 1835, forfeiting the land. And we are not left to conjecture as to the points upon which these three judges did dissent. In the closing paragraph of his opinion, Mr. Justice Strong says: "I am, therefore, of the opinion that the circuit court erred in refusing to affirm the defendants' fourth and fifth points, and also in the instruction which was given to the jury respecting the effect of the statute of limitations. For this reason I think the judgement should be reversed and that a *venire de novo* should be awarded." And by reference to pages 147-8, of the case it will be seen what the defendants' *fourth* and *fifth* points were, and also what the instruction given to the jury respecting the effect of the statute of limitations was.

*Lavasser v. Washburn*, 11 Grattan, 572.

The effect of the statute passed February 27, 1835, was also in question in this case, and the decision of the court as to that question is stated in point 3, of the syllabus, thus:

"3. The forfeiture of the land for the failure to enter it upon the commissioners books and pay the taxes and damages due upon it, was effected by the statute, and required no judicial proceeding to complete it. The forfeiture was therefore, complete at the time fixed by the statute.

*Ushers' heirs v. Pride*, 15 Grattan, 190.

This case is, as I regard it, a very important one and treats of matters but lightly touched on the other four last cited cases, except the first and second points of syllabus in regard to the validity of the certificate of the auditor.

The decision of the court is fully and fairly epitomesed in the four points of the syllabus, as follows:

"1. A certificate purporting to be made by the Auditor of the State, in pursuance of the Act of March 15, 1838, Sess. Acts, p. 16, 8, 7, of land forfeited for non-payment of taxes being in the usual form in which he certifies papers from his office is evidence of the execution of such certificate, and of the official character of the paper, and also of the facts therein contained.

2. Though such certificate was made in 1844, yet it having been offered in evidence in 1856, it is *prima facie* evidence, by the Act, Code, ch. 176, S. 4, p. 660, though said Act was passed after the certificate was made, (referring to the Code of 1849).

3. Lands returned delinquent for non-payment of taxes between 1820 and 1831, were forfeited by the Act of April first, 1831, Sup. R. C., p. 345, S. 2, if not redeemed before the first of November, 1833; and by subsequent acts the time was extended; but the forfeiture became complete on the first of October, 1834; and the forfeiture was not released, unless the owner redeemed the land in the mode provided by the statute.

4. The heirs of a patentee of land forfeited for non-payment of taxes and not redeemed, cannot maintain ejectment for it against a party who has entered upon it peaceably, though the tenant has no title to the land."

None of the acts of the General Assembly of Virginia forfeiting land for any cause have ever been held unconstitutional or otherwise invalid by the Court of Appeals of Virginia. But on the contrary, in every case decided by that Honorable Court, their validity was sustained. And the case of *Kinney v. Beverly*, 2 Henning and Munford, 318, cited by the counsel for the plaintiff *in error*, on page 50 of his brief, is no exception to what I have asserted. He says this decision "is a clear exposition of the law upon this subject." He then states the question as he understood it, involved in the case as follows:

"The question was whether the failures to pay the taxes for three years operated to forfeit the land without an inquest of office," and he makes an elaborate quotation from the opinion of Judge Tucker in the case to sustain him in his antiquated notions. And everything said by Judge Tucker about an inquest of office was entirely outside of the only question involved in the case. But three judges sat in the decision of the case, and neither of the

other judges sustained him in anything he said about an "inquest of office," which did not, in fact, arise in the case at all.

The two acts of the General Assembly of Virginia, upon which the decision of this turned, were those of December, 1790 and December, 1792, both of which acts are found on pages 51 to 53, inclusive of this brief. And there was no such question arising under these statutes as that stated by the counsel in *his* brief. The only question decided in the case was to affirm the judgment of the court below, in favor of the plaintiff, *Beverly*.

The case was an action of ejectment brought by the plaintiff for the recovery of real estate in the county of Augusta. The land in question was granted by the commonwealth to William Beverly and others, and afterwards the said Beverly became the sole owner of the whole tract. He devised the land by will to his son, Robert Beverly, the lessor of the plaintiff in the action. The defendant Kinney claimed a part of the land with the lines of the patent first named but junior thereto, and both parties were seized and possessed of the parts thereof claimed by them respectively. The lands in question were never assessed with taxes in the name of the lessor of the plaintiff or any other person owning them from the date of the patent to the date of the trial. A special verdict was rendered in the case, and judgment given thereon for the plaintiff, notwithstanding the fact that no taxes had ever been assessed or paid on the lands by Beverly or any of those under whom he claimed.

There was no law in Virginia at that time, and never had been, forfeiting lands for the failure to have them entered and charged with taxes in the names of the owner, on the land book of any county. And this being the fact, no taxes on them was or could be placed in the hands of the sheriff for collection against the owner, and ~~he could~~ be returned delinquent for failing to pay taxes not assessed against him. And therefore under the acts in question a failure to pay taxes *not* assessed against him, for three years, or thirty years, could not operate as a forfeiture of land; and the court so decided. The land, under the provisions of the acts in question, was never forfeited. And the trouble with the counsel in writing his brief was that he wholly misapprehended the question involved or the ~~question~~ decided in the case. And this was not the only mishap of the kind that overtook him in the preparation of his brief.

*Smith v. Chapman*, 10 Grattan, 445. This is the last of four several cases, all decided at the July term 1853, of the Court of Appeals of Virginia, and in all of which, the validity of the several acts of the legislature of that State forfeiting lands for the several causes therein mentioned, was sustained. It was an action of ejectment brought by *Chapman's lessee v. Augustine J. Smith and Joseph Hamrick*, in the Circuit Court of Kanawha county. The plaintiff claimed under a patent for 94,600 acres of land in Kanawha county to George Keith Taylor, who conveyed the land to two others, who conveyed it to five others, citizens of Massachusetts, who conveyed to Elias H. Derbey, also a citizen of Massachusetts, 61,048 acres of the tract. And in November 1841, the whole tract was reported to the Circuit Court of Kanawha county, by the commissioners of delinquent lands for that county as forfeited to the Commonwealth for the failure of all the parties to put it on the commissioner's books for taxation; one part of the tract in the name of Derby, and the remainder in the name of Blake and others; (The usual result, where these large tracts were owned by citizens of other States). The defendants claimed under a patent to Boies and Tally for 50,000 acres lying partly in the county of Kanawha and partly in the county of Jackson, and the part of their tract lying in the county of Kanawha was also covered by the Taylor patent.

This Boies and Falley tract was reported in October, 1840, by the commissioner of delinquent lands for the county of Jackson to the circuit court of Jackson county as forfeited to the commonwealth for the non payment of taxes assessed thereon, in the name of the owner. And on the 14th of the same month, in vacation, the Judge of the Circuit Court of Jackson county made a decree for the sale of the whole tract in both of said counties by the commissioner of delinquent lands for Jackson county, and on the 23d day of November, 1840, the whole tract was sold as required by said decrees, and was purchased by the defendant Augustine J. Smith as aforesaid.

On the 4th day of November, 1841, the Circuit Court of Kanawha county made a decree directing a sale of this Taylor tract by the commissioners of delinquent lands for that county, and in May 1842, the commissioners reported that they had divided the tracts into lots; the remainder of the tract not sold to Derby being divided into lots numbered 1, 2, and 3, and the part conveyed to Derby into lots numbered 4, 5, 6, 7 and 8, and that Hiram Chap

man (the plaintiff) was the purchaser of lots numbered 1, 2, 5 and 8. And in May, 1842, this report was confirmed, and the commissers were directed to convey the land to the purchasers. This was six months after the sale of the Boies and Falley tract had been confirmed, and the commissioner in Jackson county had been directed by the decree of confirmation to convey the tract to Smith upon the payment of the deferred installments of the purchase money. These lots were conveyed to Chapman by deed bearing date the 11th of July, 1842, and the Boies and Fally tract to Smith by deed bearing date the 16th of September, 1843. This fact is noticed in the report of the case, but no point was made in regard to it. There is nothing in the report of the case showing which of the tracts was first forfeited, nor does appear to have been deemed by the court or the parties, a material point in the case.

This case of *Smith v. Chapman* is a very important one in the series of cases decided by the Court of Appeals of Virginia in regard to the disposition of delinquent and forfeited lands under the laws of Virginia which had been passed by the General Assembly of that State, under which the two tracts of land in question in that case had been forfeited; one for the failure of the owner thereof to pay the taxes *assessed* thereon, and the other for the failure of the owners thereof "to put it on the commissioners' books," in order that it might be *assessed with taxes.*

And the forfeiture of both tracts so forfeited, was fully and without question, sustained by the Court. The opinion of the Court in the case was delivered by Judge Lee, the same Judge who delivered the opinion of the Court in *Wild's Lessee v. Serpell*, in which this case, among others, is quoted as the basis of that opinion.

There has been no case decided by the Supreme Court of Appeals of West Virginia, in which the validity of the Constitution or Statutes of the State forfeiting lands for any of the causes mentioned in either, have ever been questioned, and, therefore, it could be truly said by the counsel for the plaintiff *in error*, that said Court had never decided them to be valid. No occasion for such a decision has ever arisen in that Court. But when, if ever, it does arise, the counsel will find that his new born confidence in that Court, has been sadly misplaced. But in every case before them in which the validity of the one or the other might have been questioned, that Court has enforced them to the letter. And I will refer, specially, to but two of them.

*McClure v. Maitland*, 24 W. Va. 561.

This whole case is stated in the unanimous opinion of the Court delivered by Judge Snyder, commencing on page 561, and ending on page 583, the first and last pages of the case. And I am very sure that the attorney or judge who reads this opinion from beginning to end, will have no occasion to doubt the fact, that our Supreme Court of Appeals is in full accord with the courts of Virginia, in regard to the necessity, propriety and validity of the laws forfeiting lands for all the causes therein mentioned in order to enforce the collection of her revenue for the support of the government.

The counsel for the plaintiff *in error*, on pages 94–5, of his brief, partly, in reference to this case, says:

"Virginia, up to 1835, led several crusades against lands and landowners, and being beyond the reach of federal control, scourged many of the large tracts of land out of existence; and West Virginia, soon after she got out of swaddling clothes and civil strife and gathered back her law makers from the opposing armies, to which they had respectively lent their aid, opened war upon property rights, and began with the land of non-residents that had survived the early carnival of confiscation, a saturnalia of rapine and plunder and a "communism of pelf" that has existed up to the present time, with laws for forfeiture, adverse possession and color of title, the counterpart of which cannot be found in the annals of law.

"The land laws enacted in West Virginia are such as may be expected where one class of people make laws for the government of the property of another class. Where the trespasser makes the law by which he shall hold property upon which he has encroached, the laws will be liberal—with the other man's property.

"The passion and prejudice of which Chief Justice Marshall, in *Fletcher v. Peck*, 6 Pet. 137, feared the effect, has been well exemplified in West Virginia. Happily, however, very little land has come within the operation of the forfeiture provision of the constitution.

"While the Supreme Court of the State has never held the forfeiture law of West Virginia to be valid and, as I believe, never will, and has not, until lately, been confronted with the question, the court, as previously constituted, has apparently contemplated the early Virginia acts with approval and pleasure, and counsel for

defendants in error will doubtless quote with pride, as they have heretofare done, from *McClure v. Maitland*, 24 W, Va., 525, this declaration with regard to the scheme of forfeiture :

" 'The whole history of the system shows a most earnest and determined effort on the part of the Legislature, the judiciary, and the people, speaking through our present Constitution, to destroy and anihilate the titles of such delinquent owners.'

"To have these lands placed upon the books by the assessors and taxed and sold, if the taxes were not paid, did not suit the wise and benevolent purposes of the law makers, who didn't want revenue, but wanted only to 'destroy and annihilate' titles to property and to break up estates.

"Exalted purpose, glorious achievement of the Legislature, the people and the courts! Proud indeed would we be to hear this related of us by a barbarian traveler at the court of a barbarian despot. Here is the apotheosis of nihilism !

"With pain we hear this said of the judiciary by the judiciary. We can understand the patriotism of legislators, scheming politicians, who are ready to sacrifice other peoples' property to the STATE with one hand while they receive it from the State with the other; but we cannot comprehend how Judges can contemplate such outrage upon the law without righteous indignation.

"For the courts know that forfeiture laws, past and present, and especially the present one, besides their other vices, are pregnant with temptation and allurements to bribe and seduce public officers, and corrupt public justice. Wherefore forfeitures are hateful in law and should have no place between the State and the citizen."

But in this and all other like cases, the citizen "is not in it." When *his* land is forfeited for his failure to pay the taxes assessed and due upon it, he accepts the situation, and either avails himself of the privilege given him by the law and redeems it, or lets it go to the State for the benefit of the school fund.

It is the non-resident claimants of these large tracts of land to whom these forfeitures are hateful, and why? Because they compel them to pay their taxes or lose the lands claimed by them. And these non-residents as well as the counsel, seems to be of opinion that they have a vested right to defraud the State of the revenue chargeable upon their lands, by keeping them off the land books, and that it is their rights, alone, which the authorities and people of the State of West Virginia are bound to respect. I

don't think that this Honorable Court will be inclined to agree with them in that opinion, but will be more likely to hold, that the honest, tax-paying owners and occupants of the lands in question, have *some rights*, which even a non resident tax dodger is *bound to respect*. And that the harsh and uncalled for language of the counsel in regard to the authorities and people of West Virginia, on pages 94–5 of his brief, will have the opposite effect from what was intended.

I have, at times, been strongly tempted to reply to the language used by the counsel in *kind* and with *interest*, but I could not forget where I was, and that it was no place in which to bandy epithets.

I am well aware of the fact, that the learned counsel feels ill at ease over the unfortunate predicament in which he finds his client in this case as the result of bad advice from *somebody*, to purchase this 500,000 acres of land, notwithstanding the fact that it had been again forfeited to the State of West Virginia two years previously. But this, I submit, is no excuse for the course pursued by him in the discussion of this case in various places in his brief from one end to the other.

And here I beg leave to assure the counsel that his idea that the Supreme Court of Appeals of West Virginia, will never sustain the forfeiture laws of the State, in letter and spirit, is but an idle dream, never to be realized. And that if there is any one thing, more than another, in which the people and the authorities of the State are of one opinion, regardless of all political affiliations, it is in regard to maintainance of these "forfeiture laws." And in the determination to enforce them at all hazards and to the last extremity ; unless this Honorable Court should decide against their validity. A decision I cannot anticipate, in view of the consequences that would follow, as well as in view of what it has already decided, bearing on that question.

To set aside these "forfeiture laws" and change the policy of the two States for more than two hundred years, would throw the land titles of the State of West Virginia, from center to circumference, into inextricable confusion for generations to come, the end of which no human tongue can tell, and to open a worse than "Pandoras' Box," more disastrous, if possible, to the material interests of West Virginia, than would be war, pestilence or famine.

*Yokum v. Fickey*, 37 W. Va., 762.

The validity of the "forfeiture laws," both of Virginia and West Virginia, were, to some extent, involved in this case, as appears by the *third* and *fifth* points of this Syllabus, as follows:

"3. FORFEITURE—DELINQUENT AND FORFEITED LANDS—REDEMPTION.

"In such cases, the failure to enter and pay the taxes due on the land and the damages, in the manner prescribed by the act of February 27, 1835, caused the forfeiture to become absolute and complete, and no inqusition, judicial proceeding or inquest or finding of any kind was necessary to consumate the forfeiture.

"5. FORFEITURE—DELINQUENT AND FORFEITED LANDS—REDEMPTION.

"In order that a party may be entitled to land which has been forfeited to the State of West Virginia, by transfer, the party claiming title by transfer, must show himself entitled thereto by bringing himself within one of the three classes of persons described in Section 3, of Article XIII, of the Constitution, which was carried into the statute and is found embodied in Section 40, of Chapter 31, of the Code of 1887."

(The edition of the Code of 1868, published in 1887, is here intended.)

The following is section 3, of Article XIII, referred to:

"3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees), for so much thereof as such person has, or shall have had actual continuous possession of, under color of claim of title for ten years, and who, or those under whom he claims, shall have paid the State

taxes thereon for any five years during such possession ; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims has, or shall have paid all State taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant, if it shall have issued since that year ; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years, after the year 1865, and have paid all State taxes charged or chargeable thereon for said period."

Before calling attention to the cases decided by this Honorable Court, bearing upon the question involved in this case, I desire to notice the case of *Reed v. Dingess*, 60 Federal Reporter, 8, C. C. A., referred to by counsel for plaintiff *in error*, on page 130, in the Appendix to his brief. I was the counsel of the defendant, Dingess, in this case, both in the Court below and the Circuit Court of Appeals at Richmond, Virginia : and was, therefore, in a position to know all that was in it. The tract of land in question in it, was 100,000 acres situate in the counties of Logan and Boone in West Virginia, owned by the said James Swan, of Boston, in his lifetime, and of which the said Robert E Randall was trustee for the alleged creditors of Swan, from 1866 to 1886. The tract was forfeited to the State of West Virginia, under an act of her Legislature passed in March, 1869, for Randall's failure to enter it on the land books of these counties, or one of them, and have it charged with taxes in his name, within one year from and after the passage of the act. As already stated, the Code of West Virginia was adopted in 1868, but did not take effect until July 1st, 1869, and the Legislature that adopted it, adjourned without providing for its publication. And it was not published until 1870, and when it was published this act of 1869, was incorporated into it as section 31, of chapter 31, of that Code, as follows :

"34. It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the State taxes thereon not charged to the owner for the year 1832, or any year thereafter, heretofore or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have for *five* successive years, been charged on such books with such taxes on such real estate, the same and all the tittle, rights and interest of the owner, legal and equitable, thereto, shall without any proceeding, be absolutely forfeited to and vested in this State. Provided, however, that such owner may, within one year after the passage of this act, cause such real estate to be charged with such taxes chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure to so charge the taxes for such years." This is all of said act that need be quoted. It is found in full on pages 198-9 of the Code of 1868. (This act accounts for the year 1869, being fixed as a date in the Constitution, Article XIII.)

It was notorious at the time of the passage of this act that Robert E. Randall was paying no taxes on the lands of which he was trustee, in any part of the State, and he paid no attention to the act, but kept on in the old way. And it was understood at the time that none of the lands in the State of which he was trustee, were entered and charged with taxes in any county of the State. (I will ascertain the truth of this matter in time for the argument of this case.)

Counsel for the plaintiff *in error*, quotes a small scrap which he says was quoted by counsel (but what counsel he does not say, and I don't know,) from the syllabus to the case as follows:

"Lands were forfeited for failure to enter the same for taxation. Const. W. Va., Art. 13, sec. 6," and adds: "The purpose of the counsel is to give the impression that the court so decided, which it did not."

The balance of the paragraph is, I suppose, highly important, in the opinion of the counsel.

In order that this Honorable Court may conveniently see what the Appellate Court did decide, I quote the following from the opinion of that court in the case:

"These patents of large tracts of land, imperfectly surveyed,

usually including within their boundaries, but excluding in their words of conveyance, undescribed tracts of land previously granted, covering tens and hundreds of thousands of acres of land, existed in Virginia, as in many other States. They were fruitful sources of litigation. They prevented settlements by *bona fide* purchasers of land, encouraged the existance of squatters and withheld land from cultivation. It is not good policy for any government to encourage the withdrawal of land from cultivation for speculative purposes. The only remedy, when it is so withdrawn, is to subject it to the ordinary taxation that rests upon other real property. That will, in ordinary cases, render the holding of it unprofitable, and it will either be divided up and sold, or surrendered to the State, through the operation of the machinery of taxing laws. It will, in the latter case, remain in the hands of the State—the only holder properly exempt from taxation—until it is required for private use. But it is difficult to reach tracts of land, held as these large patents are, by the ordinary processes of tax laws. Resident owners of land, as a rule, pay their taxes, if not when due, then within the time allowed for redemption. When such taxes are not paid, it is usually not difficult to sell the defaulting owner's land to persons who are willing to pay the amount of the tax. These facts do not obtain in the case of non-resident owners of large tracts of unimproved land. When the State bids in the land, it obtains a tax title, and it is matter of common knowledge that, owing to irregularities of one kind and another, tax titles are seldom perfect. But the main difficulty in these cases appears to be that these tracts do not appear upon the tax list at all. Laws like those of the Virginias strike at the root of both of these difficulties. They forfeit the land upon the failure of its owner to have himself charged on the proper books for taxation, and they vest title immediately in the State; thereby avoiding all questions of validity of title, which might otherwise arise upon possible irregularities in assessment, or on proceedings previous to or at the sale.

"If such legislation can be sustained, it is more effectual than are the more common modes of collecting real estate taxes. But it is contended that such laws are unconstitutional, in this: That they conflict with the fifth and fourteenth amendments of the Constitution of the United States, by depriving persons of their property without 'due process of law.' Plaintiff's contention is that he is entitled to require some legal proceeding, upon due

notice,-and something analogous to a judgment before his title to land can be divested, and that, this manner of proceedings not having been adopted, he has the right to have the deeds given to defendant set aside, as ambarrassing his right to redeem, which he claims is still in existance. We know of no reason why a forfeiture of title to land for sufficient cause, by statute or constitutional legislation, is not by 'due process of law.' It certainly is not that arbitrary exercise of the powers of government which Magna Charta intended to prevent, when it declared that no person should be deprived of life, liberty or property except by the judgment of his peers or the law of the land. The contention that the Constitutional provisions re-enacting those of the great charter require something in the nature of process and judicial proceeding before divesting title seems inconsistent with accustomed methods of enforcing revenue laws, which are themselves as old as Magna Charter. The objection appears to be, not to the right of a State to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty. All penal legislation does that. It is to declaring the forfeiture complete by the act, without any subsequent legal procedure. But if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the State to enforce the forfeiture."

John R. Reed, the plaintiff in this case, is, as I am informed, a lawyer of high standing in the city of Philadelphia, and one of the averments of his bill was, that the tract of land in question had never been entered and charged with taxes on the land books of any county in the State of West Virginia, and that it had thereby become liable to sale for the benefit of the school fund; thereby conceding the fact that the land had forfeited to the State of West Virginia, for that reason, as the land could not become liable to sale for the benefit of the school fund in any other way than by forfeiture. And I as counsel for the defendant Dingess, took him at his word and demurred to his bill. And the case was heard and determined on the bill and exhibits filed therewith and the demurrer of the defendant thereto. And the judge of the circuit court, Hon. Nathan Goff, after an elaborate argument of the case, took time to consider, and after maturely considering the case, he sustained the demurrer and dismissed the bill with costs, and the plaintiff carried the case to the Circuit Court

of Appeals at Richmond, Virginia, where the decree appealed from was unanimously affirmed.

The object of the suit was to set aside the sale and deeds to defendant Dingess, for several thousand acres of land, reported by the commissioner of school lands of Logan county to the circuit court of that county, as waste and unappropriated lands; and sold as such, by the orders and decrees of that court, and purchased and paid for by Dingess, the defendant, and conveyed to him by deed duly executed and recorded. The plaintiff also avers in his bill that the lands so sold and conveyed to Dingess were not waste and unappropriated lands but were within the exterior boundary lines of the said 100,000 acres of which he was trustee for the (alleged) creditors of Swan. But the copy of the patent for the land filed with the bill, showed that there was included within its exterior lines a prior entry and survey, as I remember it, for some 70,000 acres, which were excluded from its operation, and the bill failed to aver that the lands so sold and conveyed to Dingess were outside of that 70,000 acres. He claimed that he had the absolute *right* of redemption in the lands so sold and conveyed to Dingess, and asked that the sale and deeds to Dingess be set aside as an obstruction to the exercise of his said right of redemption in the lands. But both of said courts differed with him as to such claim. And the reading of the opinion of the Circuit Court of Appeals, as above quoted, shows, I respectfully submit, that *that* Court agreed with Mr. Reed that the tract of land in question *had* been forfeited.

At this point I propose to notice a few things in the brief of the counsel which I have overlooked thus far. On pages 99, 100, he takes up the question of

"THE FORFEITURE AS AN ABANDONMENT."

In discussing this question, he *gravely* says:

"Counsel for defendants in error, will contend, unless they have been convinced of the folly of it, that 'the failure of the owner to have his land entered on the land books' is 'equivalent' to a declaration of abandonment of the land by the owner, a declaration that it isn't his; that he doesn't want it, that the State or any one else can have it, &c.; and that the provision of the Constitution is, in substance and effect, a declaration by the State, that the

owner of the land has abandoned it, and doesn't want it, and has dedicated it to the State and all others who may care for it.

"To what declaration of the owner the *failure of the State to tax the land* or its dropping it from the land books *after he has had it entered*, which only is the cause of forfeiture, is equivalent, I have not heard stated.

'Abandonment includes both the intention to abandon and the external act by which the intention to abandon is carried into effect. Am. & Eng. Enc. Law.

"To constitute an abandonment there must be the concurrence of the intention to abandon and an actual relinquishment of the property. *Judson* v. *Malloy*, 40 Cal. 299. Intent is the essence of abandonment, and it cannot be contended in seriousness, that the Legislature can supply an intent that does not exist in fact, and make an abandonment of property that the claimant is endeavoring to hold and of which he is in actual use and enjoyment; for the forfeiture provisions make no distinction between vacant lands and those that are held in the fullest use and occupancy."

In answer to the *very grave* suggestion of the counsel of the plaintiff *in error*, the counsel for the defendants *in error*, beg leave to assure him that they have seen nothing tending to convince them of the "folly of" contending for the validity of Article XIII, of the Constitution of West Virginia, and of the Acts of the Legislature of the State, passed before and after it, forfeiting lands for the failure of the owners to have them entered and charged with taxes in their names on the proper land books, as all owners of lands living in or out of the State are required to do, or loose their lands, if that failure continues for five successive years, by the forfeiture thereof for that reason. But on the contrary thereof, we are very decidedly of the opinion, that if there is any difference in the case of a man who obeys the Constitution and laws of the State by having his land entered and charged with taxes, and when the taxes charged thereon, for any reason, finds himself unable to pay them, and they are returned delinquent and sold to pay the taxes *assessed* thereon, and the land owner, residing out of the State who dodges and hides himself away during the period of the year when the assessor is engaged in his official duties, and thus *keeps* his land off the land books from year to year so that it cannot be *assessed* with taxes. A thing which the citizen and resident of the State cannot do, the difference between the two, is decidedly in favor of the man who obeys the law. And as long as

we have the Legislation of Virginia and West Virginia, and the uniform decisions of the courts of both States, as well as the decision of this Honorable Court as we understand them, to sustain us, and nothing, *absolutely* nothing, on the other side but the brief of the learned counsel, without, as we regard it, any authority worthy of consideration, to support it, we are not likely to be so convinced. I for one, have not followed the counsel in his meanderings through the other States of the Union, to find out what the *other States* may have decided under their Constitutions and laws, which are of no authority in Virginia and West Virginia, where they differ with the courts of our two States on the questions involved in this case.

The counsel writes very flippantly as to what an easy matter it would have been for the assessors themselves, without regard to Randall, to have entered and assessed the land in question, with taxes—in his name. But an examination of Randall's so-called decree of redemption, effectually disposes of the suggestion. Randall had taken good care to prevent that very thing from being done even if it could have been done otherwise, which I deny. By the express terms of that decree, the assessors could not act until a copy of the decree was certified to them, or one of them at least, and the clerk of the court could not certify a copy of the decree to any assessor, until directed by Randall or his attorney. And no such direction was ever given. At the date of the decree, Randall had been trustee of the land for seventeen years, and during these years he had worked his trusteeship for all that was in it. And finding three years afterwards that there was nothing more in it for him, he resigned his trusteeship, and John R. Reed, of Philadelphia, was appointed in his place. The sale of the lands negotiated by him in 1883, enabled him to compromise with the commissioner of school lands of Wyoming county, and pay him $8,000.00 in full satisfaction of all the taxes, interest and costs due and unpaid on the land; by a compromise of the matter which the commissioner had no right to make, and left him with $7,000.00 cash still on hand. And we have no knowledge or information of what became of it. Reed at the date of his appointment, had still two years in which to enter and charge the land on the books of the severel assessors, with the taxes and interest thereon for the previous three years, which, however, he, like Randall, failed and refused to do. And thereby the land became forfeited to

the State of West Virginia, at the end of the year, 1888. And has remained in a state of forfeiture ever since.

Randall knew, and Reed was bound to know, that unless the land was entered and charged with taxes on the proper land books, before the expiration of the said five years, it would for that reason, be forfeited to the State. And like Randall, Reed defied the law and failed to enter it, and it became forfeited. And he had a painfully realizing sense of this fact, in his suit with Dingess. And if it had been necessary to show a concurrence in this result by Randall and Reed, which it was not, it was clearly shown by their failure to have the land entered and charged with taxes during these five years. And what the counsel says in regard to the failure of the State authorities to have the land entered and charged with the taxes, it is simply an instance of "love's labor lost." The State authorites had no power under the law, or under the decree of the court aforesaid, to perform this duty, apart from said Randall or Reed, or their attorneys. And they could not have done so without the assistance of the one or the other, or of some person specially employed by one of them for the purpose. As we have already seen, (pages 27, 28, of this brief,) the land had to be entered on the land books of the assessor of each of the three counties in which any part of it lay, and the part thereof lying in different magisterial districts of every such county, had to be charged with taxes in each of such districts. This could not be done during these three years of Randall's trusteeship, after the year 1883, without the direction of Randall, or his attorney, by terms of said decree. And after the resignation of Randall, the ~~duty~~ of directing it to be done, remained with Reed, his successor, or his attorney. And none of them ever ordered it to be done.

It was the duty of both of them as far as it could be done, to acquaint themselves with the local situation and boundary line of the tract in each of the counties and magisterial districts thereof, in which it lay, so as to direct the several assessors called upon to enter it, as the statute directed, and it was impossible for these assessors to perform this duty, without the aid of Randall or Reed or some person, or persons, having the requisite knowledge, necessary for the purpose. But the fact is that Randall never intended to have the land entered on the land books as long as he could prevent it, and his whole conduct in the matter shows it. And it was a clear case of voluntary abandonment of the lands as far as he was concerned. And Reed's idea as to his *vested* right, of which he

could not be deprived, to redeem the land from forfeiture, probably accounts for his course in the matter.

And as to what the counsel says in various parts of his brief about a want of notice to the owner that his land is *not* on the land books and charged with taxes, as it should be, there is an absolutely conclusive answer to that. Our sheriffs and other collectors of taxes on lands, have, to such people as R. E. Randall, a very disagreeable habit of calling on the owner so charged, with his tax bill in every year his land is charged with taxes, and demanding their payment. And if that officer fails to make his annual visit, the owner of the lands knows, with absolute certainty, that his land is *not* charged with taxes. One such failure might, by possibility, be accidental. But when that failure continues from year to year, he knows, beyond all question, that land is *not* charged with taxes, before the expiration of the five years.

*Murray's Lessee* v. *Hoboken Land Improvement Co.*, 18 Howard, 272.

The following are the points stated in the syllabus of this case, and are quoted from Mr. Justice Miller's Decisions of the Supreme Court U. S., Vol. I, top page 227:

"1. The act of May 15, 1820, which authorized the solicitor of the treasury to issue a warrant of distress against the property of a revenue officer, for the amount found due in adjusting his accounts in the treasury department, is constitutional.

2. Though partaking of the nature of judicial power in some respects, it is a power long exercised by the executive department in England and in the States, and is not prohibited by the division of the executive and judicial powers in the federal constitution.

3. That Congress may, by consent, authorize the defendant to bring the case after levy, into a court for judicial investigation, is not a valid argument against the proposition.

4. Such a proceeding is due process of law within the meaning of the fifth amendment to the constitution. What is meant by due process of law elaborately discussed.

5. It is due process of law, because it is the usual and appropriate mode by which the English government, from whose *magna charta* the process is derived, has always used it, or its equivalent, in enforcing from debtors the amounts due the government on account of its revenues.

"It is not a search warrant, it is not within the provisions of the constitution requiring affidavits to make the warrants valid.

7. The return of the marshal that he had levied on lands on such a warrant is *prima facie* evidence that there was no personal property on which he could levy."

I regard this as the leading case on the question as to what *is* "due process of law," or in the words of *Magna Charta*, "the law of the land," in proceeding by a State to enforce the collection of her taxes, or of debts due her by the collectors of her revenues, which he fails or refuses to pay. And as I view it, there is not a point arising in the question that is not fully covered by the points decided in this case. The main point in the question is: Can the legislative department of the government pass an act whereby the State can enforce the payment of her taxes, and other dues, by mere summary proceedings provided for by the act, and without any judicial process or proceeding whatever? If she can, then the passage of such an act is the end of the matter. The act of Congress of 1820, authorizing the issue of the distress warrant, and the proceedings under it, whereby the lands of the defaulting collector were seized and sold, without any sort of judicial process or proceeding, was just such a law, and was so held to be to the fullest extent, by the decision of the court in the case.

*First*, The court unanimously decided that the act was constitutional, as stated in the first part of the syllabus; and

*Second*, That this warrant and the summary proceedings under it, whereby the lands of Suartwont were seized and sold, *were* "due process of law, within the meaning of the fifth amendment to the constitution" of the United States, as stated in the fourth point of the syllabus.

And being such "due process of law," within the meaning of the said fifth amendment, I call upon the learned counsel for the plaintiff, *in error*, to explain, if he can, why a precisely similar statute in principle, passed by Virginia or West Virginia, would not be "due process of law," when passed for the purpose of enforcing the collection of her taxes on lands, assessed, or which should have been assessed, without the aid of any judicial process or proceedings, but by the mere force and vigor of the statutes themselves, is *not* "due process of law," or "the law of the land" within the meaning of the fourteenth amendment, sec. 1. of the Constitution of the United States. And considering the difference in the structure of the Federal and State government; the first be-

ing a government of limited and clearly defined powers, and the second being governments possessed of all legislative powers *not* prohibited by the Constitution of the United States, or by the constitution of their own State, the validity of such acts of the State is clear and unques ionable. But according to the contention of the learned counsel for the plaintiff, *in error*, the Congress of the United States *has* power to provide what *shall*, or shall *not* be due process of law, within the meaning of the fifth amendment to the Constitution, while the States have no power to do the same thing, within the meaning of fourteenth amendment to the Constitution. But unfortunately for the counsel, the courts of Virginia and West Virginia, and the courts of the United States, differ with him. No statute passed, either by the Congress of the United States, or by the legislature of either of said States, has attempted to define what *shall*, or shall *not*, be due process of law, in any case. And the opinion of the Court in *Davidson v. New Orleans*, shows, very clearly, the impossibility of doing so in terms applicable to all cases. And when statutes are passed by either, providing for the forced sales of lands by mere summary proceedings, without the consent of the owner, and without any judicial process or proceeding it is left to the courts to say whether the proceeding provided for, *are*, or are *not* "due process of law." And the courts have spoken "with no uncertain sound"

The counsel refers to several cases decided by this Honorable Court, but for what purpose, looking at the case as I do, I am utterly at a loss to imagine. For there is not a single thing in any of them, decided since the decision of the case of *Murray's Lessee* v. *Hoboken Land Improvement Co.*, inconsistent with the points, or any of them, decided in that case.

*McMillen* v. *Anderson*, 95 U. S. 37.

This was a tax case brought here by a writ of error to the judgement of the Supreme Court of the State of Louisiana. The plaintiff *in error*, had been assessed with a license tax under a law of the State which he failed to pay when called on by the tax collector, and that officer, in pursuance of the statute, and without any judicial process or formality, seized the property of the party assessed, and was proceeding to sell it for the payment of the tax, in the manner prescribed by the statute of the State, when he was enjoined by the owner of the property from selling it. And the court in which he filed his bill, dissolved his injunction. He then appealed to the Supreme Court of the State

and that court affirmed the judgment of the court below. And the plaintiff brought case by writ of error to this Court, and the judgment appealed from was unanimously affirmed by this Honorable Court. The opinion was delivered by Mr. Justice Miller, and on page 41 of the case, the Court say:

"Looking at the Louisiana statute here assailed—the act of March 14, 1873—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all the governments, are necessarily summary, that it may be speedy and effectual. By summary is not meant arbitary, or unequal, or illegal. It must, under our constitution, be lawfully done. But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistence to unlawful taxation. We need not go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail *to* refuse *or* pay his license tax (the words *to* and *or* ought evidently to be transposed here) the collector shall give ten days written or printed notice to the delinquent requiring its payment: and the manner of giving this notice is fully prescribed. If, at the expiration of this time, the license be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days advertisement, the property of the delinquent, or so much thereof as may be necessary to pay the tax and costs." And further along the Court say: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present at some tribunal when he was assessed. But this is not, and never has been, necessary." The judgment of the State Court was affirmed.

*Davidson v. New Orleans*, 96 U. S. 97. The opinion of this Honorable court in this case was also delivered by Mr. Justice Miller. And commencing on page 502 of the case, the Court say: "An exhaustive judicial inquiry into the meaning of the words, "due process of law," as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or

after the manner of such courts. *Murry's Lessee, et al v. Hoboken Land Improvement Co.*, 18, H. M. 272. That was an action of ejectment, in which both parties asserted title under Samuel Swartwent; the plaintiff, by virtue of an execution, sale and deed, made on a judgment obtained in the regular course of judicial proceedings against him; and the defendant, by a seizure and sale by a marshall of the United States, under a distress warrant issued by the solicitor ot the treasury, under the act of Congress of May 20, 1820; &c.

And on pages 103-4 of the case, the Court say:

"The Court held that the power was executive, and not judicial; and that the issue of the writ, and the proceedings under it, were due process of law within the meaning of the Constitution. The history of the English mode of dealing with public debtors and enforcing the revenue laws is reviewed, with the result of showing that the rights of the crown, in these cases, had always been enforced by summary remedies, without the aid of the usual course of judicial proceedings, though the latter were resorted to in the Exchequer Court, when the officers of government deemed it advisable. And it was held that such a course was due process of law within the meaning of the phrase derived from our ancescestors and found in our Constitution. It is not a little remarkable, that while this provision has been in the Constitution of the United States, as restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that the State and State legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him,

and of the merits of the legislation on which such a decision may be founded."

And strangely enough, this is one of the cases referred to by the learned counsel for the plaintiff, *in error*, as in some unaccountable way, helping his client.

Both of these last named cases were decided eleven years after the adoption of the fourteenth amendment.

*Kelley v. Pittsburgh* 104, U. S. 78.

This was another tax case in which the opinion of the Court was delivered by Mr. Justice Miller. And the three points of the syllabus clearly express what the Court decided. They are as follows:

"1. Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes which is established in this country, is within the meaning of the Constitution, due process of law.

"2. A State has the power to determine what portion of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such portion shall be assessed.

"3. A party is not deprived of his property without due process of law by the enforced collection of taxes merely, because they, in individual cases, work hardships or impose unequed burdens."

Kelly brought suit in the Court of Common Pleas to restrain the city of Pittsburg from collecting a tax assessed upon his lands included within the corporate limits of that city, in pursuance of an act of the Legislature of Pennsylvania, against his consent. The court dismissed his bill, and the decree dismissing it was affirmed by the Supreme Court of the State on appeal. And he brought the case, by writ of error, to this Honorable Court for final decision.

There were but two assignments of error by the plaintiff *in error*, of which this court had jurisdiction, which where as follows:

"*First.* The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburg, to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights guaranteed to him by Article 5, of the amendment to the Constitution of the United States.

"*Second*, The Supreme Court of Pennsylvania erred in susatining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by Art. 14, Sect. 1, of the amendments to the Constitution of the United States."

The court declined to consider the first of said assignments of error for the reasons stated in page 79 of the case. But the court did decide upon the *second* assignment of error and held, that the statute in question was *not* for the reasons stated, a violation of the fourteenth amendment, section 1, of the Constitution of the United States And in closing, the court said: "These views have heretofore been announced by this court in the cases which we have cited, and in *McMillen v. Anderson*, 96, U. S. 37. In *Davidson v. New Orleans* (*Supra*) the whole of this subject was very fully considered, and we think it decisive of the one before us."

There are numerous other cases decided by this Honorable court, in full accord with the cases already cited, but I deem it unnecessary to cite them.

*Bennett* v. *Hunter*, 9 Wallace U. S. 326.

This is one of the cases cited by the counsel of the plaintiff *in error*, and I repeat, for what purpose this case is cited by him, I fail to see. So far as it decides anything applicable to this case, it is decidedly against his client—Mr. King. In this case a tract of land situated in Alexandria county, Virginia, was assessed with taxes and sold for their non-payment, under an act of the Congress of the United States passed in 1862. The points decided in the case are clearly stated in the syllabus, as follows:

"1. The act of 5th of August, 1861, 'To provide increased revenue from imports, to pay the interest on the public debt, and for other purposes,' and the act of June 7th, 1862, for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' are to be construed together; and so construed, their primary object to be regarded as having been the raising of revenue.

"2. Thus construed, the first clause of the 4th section of the Act of 1862—which clause enacts, 'that the title of, in and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to

the United States,' does not operate *proprio vigore*, to vest the title of the land in the United States upon the non-payment of the taxes; that clause being followed immediately by another which says, 'and upon *the sale hereinafter provided for* shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.' The first clause merely declares the ground of the forfeiture of title, namely, the non-payment of the taxes; while the second clause was intended to work the actual investment of the title in the United States or in the purchaser at the tax sale through a public act of the government.

"3. Under the act of 1862, the right to pay the tax and relieve the land from sale is not limited to sixty days after the fixing of it by the proper authorities. Payment prior to the sale is sufficient.

"4. Payment of the tax, which is the act required to be made by the owner, need not necessarily be made by the owner in person. It is enough that it be made by him acting through some friend or agent, compensated or uncompensated; any person, in short willing to act in his behalf, and whose act is not disavowed by him."

The owner of this land was, at the time of the sale of it, absent in the Confederate army, but a tenant of part of the land tendered to the collector of the taxes the full amount of the taxes, &c., due on the land before the sale was made, but as the act by its terms, required the taxes to be paid by the owner, *in person*, the collector refused to receive them, and sold the land, and it was purchased by one Chittenden, who leased it to Bennett, the defendant in the State court, but plaintiff, *in error*, in this Court, who took possession of the land under his lease. After the close of the war, suit was brought against him in the State court by Hunter, the owner of the land, for the recovery thereof, in which he obtained a judgment for the recovery. The defendant obtained a writ of error to this judgment, and carried the case to the Supreme Court of the State, where the judgment of the court below was affirmed. And the case was brought here by Bennett, by writ of error to the judgment of that court. The opinion of the court here was delivered by Chief Justice Chase, and is found on pages 333 to 338 of the case.

The contention of counsel for the plaintiff, *in error*, was that the

tax on the land being due and payable at the end of sixty days from the day on which they were assessed on the land, and not having been paid at that time, the default of the owner in paying them, worked a forfeiture of the land to the United States, at that time, and before the sale thereof. But the court decided otherwise, and held that the title to the land remained in the owner until the sale theroof was made to Chittenden, the purchaser at the sale. And that the collector of the taxes should have accepted the money tendered by the tenant, and, stopped the sale of the land, and affirmed the judgment of the State Court. And special attention is called to the language of the Chief Justice on pages 335 and 336, of the case. I suppose the counsel in the case must have talked about an "inquest of office," and on the pages named, among other things, he says:

"Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivolent to office found, it is certainly proper to assume that an act of sovreignty so highly penal is not to be inferred from language capable of any milder construction." And further along, on page 336, he says:

"Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it independently of the second clause It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely, non-payment of the taxes, while the second clause was intended to work the actual investment of the title through a public act of the government in the United States, or in the purchaser at the tax sale. *The sale was the public act, which is the equivalent of office found.*" (Italics mine.)

There is, therefore, I respectfully submit, nothing, whatever, in this case favoring the contentions of the counsel of the plaintiff *in error*, but so far as there is anything in it bearing upon the forfeiture of lands by proceedings under the provisions of a statute, alone, it is clearly against his contentions. On page 328 of the case, (speaking of the act of Congress in question.) the court say: "The 3rd section allowed the *owner or owners* of the land, *within sixty days* after the amount of the tax charged therein, respectively,

should have been fixed by a board of tax commissioners (the appointment of which was provided for by the act,) to pay the same to the commissioners and take a certficate thereof, by virtue of which the lands should be discharged from the tax." But the act did not say that the failure to pay the tax so fixed, in sixty days, should work a forfeiture of the land. But on the contrary thereof, the act went on to provide for the sale of the land for the payment of the tax, and the penalty attached thereto for the failure to pay, and the costs of the proceedings, and provided that the sale of the land when made, should divest the owner of the land of his title thereto, and vest it in the purchaser of the land at the sale, or in the United States. And, therefore, the court very properly held that the act itself, without a sale of the land, did not work a forfeiture of it.

If the act of Congress in question had declared that the failure of the owner of the land to pay the tax within the said sixty days, should of itself divest the owner of the land of his title thereto and vest it absolutely in the United States, it would have been in exact accordance with the legislation of Virginia herself on the same subject. As far back as 1790 the Genenal Assembly of Virginia commenced the passage of acts just such as this act of Congress would have been had it so declared. On the 27th of December, 1790, an act was passed, the first section of which provided: "That so much of all and every act and acts as directs the sale of any lands for the payment of the tax thereon, shall be and the same is hereby repealed." And section five of said act provided as follows:

"5. *And be it further enacted*, That in case the tax on any tract of land within this commonwealth shall not be paid for the space of three years, the right to such land shall be lost, forfeited and vested in the commonwealth," &c. The balance of the section provides the manner in which title to such lands could be acquired by others. (See pages 51–2 of this brief.)

On December 13, 1792, another act was passed, section thirty-five of which provided as follows:

"35. In case the tax on any tract of land within this Commonwealth, shall not be paid for the space of three years, the right to such land shall be lost, forfeited and vested in this Commonwealth," &c. The balance of this section also provides how title may be acquired to such lands. And on January 20, 1807, another act was passed, the first section of which provided as follows:

"1. *Be it enacted by the General Assembly:*

That when taxes on any tract or parcel of land shall have heretofore remained, or shall hereafter remain unpaid, for the space of two years, such tract or parcel of land shall be forfeited to the Commonwealth, and shall not be subject to location." The remainder of the section allowed the former owner of the land to redeem it from forfeiture at any time within three years, upon the terms therein prescribed, to-wit: If paid the first year after the forfeiture, to be paid with twenty-five per centum interest per annum, on the amount of the taxes from the time they became due, till paid. If not paid until the second year, fifty per centum interest thereon was required to be paid. And if not paid until the third year, one hundred per centum on the amount of the taxes had to be paid, (see page 54, of this brief.) And the said act of February 27, 1835, forfeiting lands for the failure of the owner to have them entered and charged with the taxes on the proper land books, in his name, is on the same line of legislation with the acts above referred to. In each and all of them, the statutes of Virginia did, of themselves, and without an inquest of office or any sort of proceedings of record *proprio vigore*, work the forfeiture of the lands.

Under the three acts first mentioned, the sole ground of the forfeiture, was the failure of the owner to pay the taxes on his land as required by said acts, which failure may have been caused by misfortune. But the ground of the forfeiture of the land declared by the act of 1835, was the wilful, deliberate and premeditated failure and refusal of the owner of the land to obey the *commands* of the statute of the State, and have his lands entered and charged with taxes as the laws of the State commanded him to do.

This statute of 1835 and the statutes following it, have, so far as deemed necessary, been re-enacted by the legislature of West Virginia and by the people of the State, carried into her constitution, and the same old class of non-resident claimants, of what remains, of these large tracts of land, as a rule, scout and defy these laws and this constitution, and refuse to obey them, as their "illustrous predecessors" have done before them.

The counsel for the plaintiff, *in error* gravely asserts that this case of *Bennett v. Hunter* (see page 108 of his brief), holds that "Congress has not the power to impose the penalty of forfeiture of lands for the non-payment of taxes assessed thereon." And I emphatically deny that it holds, or even intimates anything of the

kind. What the court *did* hold in the case was the exact reverse of what the counsel asserts was held. What the court did hold was that the act of Congress *did not* forfeit, nor *intend* to forfeit lands for the failure, alone, of the owner to pay the tax thereon, within the sixty days there mentioned, but required the sale of the land, in order that the title of the owner of the land could be divested, and vested in the United States. And for the very reason that the title to the land remained in the owner until an actual sale thereof was made, the court held that the sale of the land, when made, was void, on account of the refusal of the collector of the taxes to accept the money tendered in payment before the sale was made. And there is one more thing which the decision of the court in this case accomplishes. It effectually disposes of the contention of the counsel for the plaintiff, *in error*, that an *inquest of office* was necessary to a forfeiture of land. *

*Munn v. Illinois*, 94 U. S. 113.

I don't refer to this case on account of anything in it, bearing specially, upon the questions involved in the case in hand, but I regard the decision of this Honorable Court, speaking through Chief Justice Wait in the case, as the ablest and most interesting discussion of the general legislative powers of the States I have ever met with any where, during my fifty-seven years of practice.

And now apologizing for the inordinate length of this brief, I respectfully submit that the judgment of the Circuit Court should be affirmed.

JAMES H. FERGUSON,
*Of Counsel for the Defendants in error.*

* See Fulkerson et al v. Holmes et al- 117. U. S. 389-
Overlooked until after this brief was printed -

Supreme Court of the United States

OCTOBER TERM, 1897

No. 157.

HENRY C. KING, Plaintiff in Error,

vs.

M. P. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK, Defendants in Error.

HOLMES CONRAD,
*Of Counsel for the Defendants in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-20-'98

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1897.**

*No. 157.*

HENRY C. KING, PLAINTIFF IN ERROR,

*vs.*

M. B. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK, DEFENDANTS IN ERROR.

This case is here on writ of error to the circuit court of the United States for the district of West Virginia.

King, the plaintiff in error, brought ejectment against a large number of defendants, complaining that they unlawfully withheld possession from him of "a certain tract or parcel of land in the States of Virginia, West Virginia, and Kentucky, being a tract of land granted to Robert Morris by the Commonwealth of Virginia by patent dated June 23, A. D. 1795, land in the said patent described as follows," &c.

The three defendants in error here elected to sever in their defense, and the cause was proceeded in as to them to verdict and judgment (Record, page 8), which was for the defendants, and the case is here on writ of error sued out by the plaintiff.

Before considering the several assignments of error relied

on to reverse the judgment below, it is proper to inquire whether the Supreme Court of the United States can review that judgment at all, and whether this writ of error must not be dismissed for want of appellate jurisdiction in this court.

The circuit court of appeals alone had jurisdiction to review by writ of error the judgment of the circuit court.

The plaintiff invoked the jurisdiction of the Federal court by the averment in his declaration of the diverse citizenship of the opposite parties to the cause. He averred no other ground for Federal jurisdiction, original or appellate.

It appears from the Record (pages 29–31) that after the evidence was all before the jury the court, at the instance of the defendants, instructed the jury as follows, viz:

"The jury are instructed that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Virginia by patent dated June 23, 1795, was (prior to the date of the deed made by John V. Le Moine to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

It is assigned as error in the judgment that the circuit court had given this instruction:

"Because the provisions of said State constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to the land out of the owner and vest the same in the State or in some other person for the failure of the owner of such land to cause the same to be entered upon the land books are wanting in due process of law and are repugnant to and in conflict with article XIV, section 1, of the amendments to the Constitution of the United States, and are in conflict with and repugnant to paramount and controlling provisions of said State constitutions, viz., article III, sections 4, 5, 9, 10, 20, and article —, section 1, and are therefore null and void." (Record, pages 33, 34.)

Here the constitution of the State of West Virginia is claimed to be in contravention of the Constitution of the United States, and, under the "court of appeals act" of March 3, 1891, section 5, writs of error in such cases may be taken from the circuit courts direct to the Supreme Court.

But this ground of Federal jurisdiction was not claimed in the declaration, and appeared for the first time at a subsequent stage of the proceedings, and not in any pleading in the cause, but argumentatively, being urged by the plaintiff as the ground of objection to the instruction given by the court to the jury.

When the jurisdiction of the Federal courts is invoked upon the ground of diverse citizenship alone, it cannot be affected by subsequent developments in the course of proceedings, and as by the act of March 3, 1891, section 6, "the judgments and decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being citizens of different States," and to the courts of appeal is given exclusive jurisdiction to review by writs of error the judgments of the circuit courts in all cases other than those provided for in section 5 of that act, the supreme court has no jurisdiction to review this judgment of the circuit court unless it appear that the jurisdiction of the circuit court was invoked at the commencement of the suit on one of the grounds mentioned in the fifth section.

The decisions of this court are clear and uniform in support of this proposition.

*Colorado Central Mining Company vs. Turck*, 150 *U. S.*, 138, was ejectment in the circuit court for Colorado, verdict and judgment for plaintiff, which on error to the court of appeals was affirmed and writ of error allowed to this court.

On motion to dismiss or affirm, the writ was dismissed. Mr. Chief Justice Fuller, after referring to the view urged on behalf of the plaintiff in error, said :

"This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the circuit court is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called to act. * * * The jurisdiction had, however, already attached, and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

The Chief Justice in this opinion quotes from the earlier opinion of Mr. Justice Harlan in *Metcalf vs. Watertown*, 128 *U. S.*, 588, as follows:

"It has often been decided by this court that a suit may be said to arise under the Constitution or laws of the United States within the meaning of that act (18 Statutes, 470), even where the Federal question upon which it depends is raised for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings or in the petition and affidavit for removal. In other words, the case at the time the jurisdiction of the circuit court of the United States attached by removal clearly presented a question of a Federal nature. * * * When, however, the original jurisdiction of a circuit court of the United States is invoked upon the single ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing that the suit is of that character. In other words, it must appear in that class of cases that the suit was one of which the circuit court at the time of its jurisdiction could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit, just as it would remand to the State court a suit which

the record at the time of removal failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend, and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind."

In *Borgmeyer, administrator, vs. Idler*, 159 *U. S.*, 413, the plaintiff brought his action to recover the amount of certain commissions alleged to be due him on the judgment recovered against the Republic of Venezuela in September, 1832, in favor of Idler, in a litigation throughout which Chataing, plaintiff's intestate, was Idler's counsel and attorney. There was judgment for the plaintiff, which, on error to the circuit court of appeals, was reversed on the ground—

"That Idler's judgment had been annulled by the courts of that country and the allowance of the claim was ultimately secured by the award made by a mixed commission acting under an international treaty."

On motion to dismiss, the case was brought to this court on writ of error, and on motion to dismiss or affirm, the writ was dismissed.

Chief Justice Fuller, speaking for the court, said:

"In *Colorado Central Mining Company vs. Turck*, 150 *U. S.*, 138, we held that when the original jurisdiction of a circuit court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset, from the pleadings, that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked, and that when the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although another ground for jurisdiction in the circuit court may be developed in the course of the subsequent proceedings in the case. * * * The jurisdiction of the circuit court depended entirely upon diverse citizenship when

the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the circuit court the writ of error could not have been entertained."

*Ex parte Jones*, 164 *U. S.*, 692, was a petition for an order to show cause why a writ of mandamus should not issue to the circuit court of appeals for the first circuit to allow an appeal to the Supreme Court from a decree of that court affirming a decree of the circuit court. This court denied the petition, and Mr. Justice Brown, in the course of the opinion, said:

"But even if another ground were developed in the course of the proceedings, the judgment of the court of appeals would be final if the jurisdiction of the circuit court were invoked solely upon the ground of citizenship."

Here the jurisdiction of the circuit court was originally invoked solely upon the ground of citizenship. Plaintiff's claim rested altogether upon the view that the constitution and statutes of West Virginia forfeiting the land of persons who for five successive years had failed to cause such land to be entered on the land books were in contravention of the Constitution of the United States; but he did not assert such claim in his declaration. He might have done so. No reason appears why two or more grounds of Federal jurisdiction may not be set up in the declaration. In *Colorado Central Mining Co. vs. Turck, supra*, Chief Justice Fuller said:

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

Certainly when two distinct grounds existed, as in this case—one of diverse citizenship, the other of the want of conformity of the constitution of West Virginia to the Constitution of the United States—and the latter ground was nec-

essary to an appeal to the Supreme Court from the judgment of the circuit court, both grounds should have appeared in the original pleading in the cause. The ground upon which the jurisdiction of a Federal court is claimed to rest should be set up by a traversable averment and not depend upon the accidents of a proceeding. Here the court gave an instruction to the jury in which it was stated that under the provisions of the constitution of the State of West Virginia the title to the land in question had been forfeited; and now appellate jurisdiction in the Supreme Court is claimed on the ground that the constitution of the State is in contravention of the Constitution of the United States. That certainly was not the ground upon which the jurisdiction of the circuit court was invoked by the plaintiff. He knew that the defendants held this land under mesne conveyances from the State, which had acquired the title under the forfeiture laws. His sole theory of attack was that these forfeiture laws did not provide the "due process of law" which the fourteenth amendment required. He did not apprise the defendants of this theory by appropriate averments in his declaration. Such averment was also necessary in order to a resort to the supreme court. The jurisdiction of the Federal courts, original and appellate, is prescribed by statutes, and they are mandatory upon the courts in determining questions of jurisdiction.

Plaintiff should have taken his case on writ of error to the circuit court of appeals, which had final appellate jurisdiction in cases which had been brought in the circuit court on the ground of diverse citizenship alone. The statute gives to the supreme court no jurisdiction in such cases. For other cases deciding that in order to give the circuit court jurisdiction of a case arising under the Constitution, laws, or treaties of the United States it must appear from the plaintiff's own statement of his claim that the case does so arise, see *Press Publishing Co. vs. Monroe*, 164 *U. S.*, 110; *Hanford vs. Davies*, 163 *U. S.*, 273; *Oregon, &c., R. R. Co. vs. Skottowe*, 162 U. S., 490.

ON THE MERITS.

The case has been so fully and admirably presented in the briefs of counsel already filed that no more would be reasonable or proper than a mere résumé of the arguments there unfolded.

The question presented here could not have arisen in many, if any, other of the original States, because the conditions out of which the question arises were wanting there. The vast territorial extent of Virginia's domain enabled, and indeed required, her to make the grants of her land in very large tracts, which in subsequent divisions of her territory extended over several counties and States.

Under the charters of 1606 and 1609, by which James the First granted the territory of Virginia, it was there defined as—

"All those lands &c. situate, lying and being in that part of America called Virginia, from the point of land, called Cape or Point Comfort, all along the sea coast, to the southward 200 miles, and from the said Cape or Point Comfort all along the sea coast, to the northward 200 miles and all that space or circuit of land lying from the sea coast of the precinct aforesaid, up into the land, throughout, from sea to sea, west and northwest, and also all the islands lying within 900 miles along the coast of both seas of the precincts aforesaid."

The western boundary of Virginia was the Pacific ocean. Augusta county, in Virginia, extended by description to the eastern bank of the Mississippi river, and the great State of Kentucky was merely a "district of Virginia." West of the Alleghany mountains population was sparse and the country mountainous and generally covered with timber. At the close of the Revolution grants were made by Virginia of vast tracts of this land, frequently 500,000 acres in a grant. The grant in this case is described in the declaration as lying in three States. As counties were laid off, the

jurisdictions in which a single grant lay became multiplied, and the difficulties in ascertaining boundaries and identifying portions of the grant became greatly increased. The burden of debt which the war of the Revolution cast upon Virginia made it imperative upon her to obtain by taxation a revenue sufficient to cover the annual expenses of her government, and also to satisfy the urgent demands of her creditors. The taxes laid upon waste and unoccupied lands were light in comparison, but the obstacles in the way of their collection appeared to be insuperable. Many of the larger land-holders were non-residents of the Commonwealth, with no personal property within her jurisdiction. The lands, from their size, location, and distribution in several counties, were difficult of ascertainment and assessment for taxation, and experience through many years proved that the owners of these lands were not bearing, but were selfishly evading, their share of the common burden.

It was to secure a proper return of their lands for taxation by the holders thereof that the policy of forfeiture to the Commonwealth in case of long-continued default was adopted.

By act of the General Assembly of Virginia passed February 5, 1810, it was enacted:

> Whereas it is represented to the General Assembly, that, many persons omit to enter their lands on the commissioners' books, and thereby elude the payment of any revenue tax thereupon; for remedy whereof,
>
> *Be it enacted*, That if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioners' book of that county in which the land lies, within eighteen months after the passage of this act, the same shall be forfeited to this Commonwealth. *Provided always*, That the rights of infants, *femes covert* and persons of insane memory shall not be affected by this law. (2 Revised Code, 533.)

And later, by act of the assembly passed February 27, 1835, it was enacted:

And whereas it is known to the General Assembly, that many large tracts of land lying west of the Alleghany mountains which were granted by the Commonwealth before the first day of April 1831, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has accrued, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

*Be it therefore further enacted*, That each and every owner or proprietor of any such tract or parcel of land shall on or before the first day of July 1836, enter, or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands owned or claimed by him, her or them through title derived mediately or immediately under grants from the Commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, 1832 had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the Commonwealth after the first day of July 1836, except only as hereinafter excepted.

And although in Virginia, by subsequent legislation, the penalty for failure to enter lands upon the commissioners' books has been changed from forfeiture of the land to fines upon the delinquent, yet in every subsequent code of that Commonwealth has the soundness of the policy and the validity of the legislation for the forfeiture of land been recognized and enforced.

By the Code of Virginia, 1849, title 12, chapter 35, section 31, referring to the effect of the preceding section, it is provided:

Neither shall it be construed to release any lands west of the Alleghany mountains which have been forfeited, or which may be liable to forfeiture for not having been entered on the land book, and charged with taxes prior to the said year 1832.

And this provision is repeated in the Code of Virginia, 1873, title 12, chapter 33, section 38.

In the admirable brief filed in this cause, entitled "Argument of James H. Ferguson, of counsel for James A. Nighbert and a large number of the other defendants named in the declaration in this case, in support of the decision of the court below," will be found collected and printed in full all the acts of the legislature of Virginia on this subject from October, 1629, down to June 20, 1863, when the constitution of the State of West Virginia was adopted, which provided in its eleventh article, section 8, as follows:

8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

LAWS OF WEST VIRGINIA PROVIDING FOR FORFEITURE TO THE STATE OF ALL LANDS WHICH THE OWNERS THEREOF HAVE, FOR THE PERIOD PRESCRIBED, FAILED TO HAVE ENTERED ON THE ASSESSORS' BOOKS FOR TAXATION.

By act of March 4, 1869, being section 34 of chapter 31 of Code of West Virginia, 1868, it was provided:

34. It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the State taxes thereon

not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, and shall not have for five successive years, been charged on such books with such taxes on such real estate, the same, and all the right, title and interest of the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this State, *Provided, however*, That such owner may, within one year after the passage of this act, cause such real estate to be charged with taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years.

In 1872 West Virginia adopted a new constitution, article 13, section 6, of which provides:

6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then, by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land such part thereof shall not be forfeited for such cause. And any owner of land so forfeited or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and that but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per cent. per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land, or interest therein: *Provided*, Such right to redeem, shall in no case extend beyond twenty years from the time such land was forfeited.

It appears from the record here that the land in controversy was part of a tract of 500,000 acres granted by the Commonwealth of Virginia to Robert Morris on June 23, 1795, then lying in the counties of Wythe and Russell, Virginia, and now lying in the counties of Mingo, Logan, Wyoming, and McDowell, in West Virginia; that by sundry mesne conveyances and legislative and judicial proceedings the title of Robert Morris to said tract of land became vested in the year 1866 in Robert E. Randall, trustee, and on June 29, 1886, in John R. Reed, trustee, and through sundry mesnes conveyances from said Reed, trustee, David W. Armstrong, and John V. Le Moyne, it passed on December 27, 1893, to the plaintiff, Henry C. King; that neither of the persons in whom the title to the land was vested had entered or caused to be entered the said land on the land books of the counties in which the land lay for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, or 1894, nor had they or either of them paid any taxes thereon for any of said years, nor was the land entered on the books of any assessor for either of said years in the name of either of the persons; that defendants were in possession of and claiming title to parts of said land within the bounds of said tract and outside the reservation in said grant when this action was brought and at the time of the trial thereof; that the annual report of U. S. Buskirk, commissioner of school land of Logan county, West Virginia, filed in the circuit court of said county August 1, 1891, showed that—

"A tract of 500,000 acres, granted by the Commonwealth of Virginia to Robert Morris, assignee of William Cary-Nicholas, June 23, 1795, situate mostly in Triadelphia district, forfeited in the name of Robert Randall, trustee, and now claimed by John R. Reed, trustee, and other claimants unknown."

That at a circuit court continued and held for Logan county on Saturday, the 1st day of August, 1891, the report

of U. S. Buskirk, commissioner of school lands for Logan county, was made to the court, containing "a list of forfeited lands lying wholly and in part within this county, which, in his opinion, are liable to be sold for the benefit of the school fund in this State, which have not been so reported to said clerk by said auditor, all of which school lands the said commissioner of school lands suggests and recommends to the court should be sold under and by virtue of a suit in chancery to be brought and prosecuted in the name of the State of West Virginia under the provision of chapter 105 of the Code of West Virginia;" and the court, being of opinion that it was right and proper that such suit should be brought and prosecuted, did adjudge, order, and decree "that suit in chancery be commenced and prosecuted in the name of this State for the sale of the said lands mentioned in said report against the said persons above indicated, which suit shall be conducted and prosecuted in accordance with the provisions of said chapter."

Chapter 105 of the Code of West Virginia, as amended, provides, *inter alia*, for such a report from the commissioner of school lands to the circuit court of his county; and

SEC. 6. Every such report shall be recorded in the chancery order book of said court, and filed and preserved by the clerk of said court in his office, and thereupon a suit or suits in chancery shall be commenced and prosecuted by and in the name of the State of West Virginia for the sale of every such tract and parcel of land so reported, as required by section four of article thirteen of the constitution of this State; * * * and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same was forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or an interest in any such lands shall, also, as far as known, be made defendants therein. And any person claiming an interest in any such land or in the proceeds thereof, not so made a defendant may file his petition in any such suit, stating what interest he claims therein, either in open court, or before a commissioner in chancery while the

suit is pending before him, or at rules, if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interests, if he has any therein, to the same extent as if he had originally been made a defendant therein.

SEC. 7. All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter 124 of the Code, and proceeded in, heard, and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the State courts of this State, except as herein otherwise provided, &c.

Section 16 provides for the recovery by the former owner of the land, his heirs or personal representatives, or any creditor having a lien on the land at the time of the forfeiture and still existing of the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon.

SEC. 17. The former owner, his heirs, devisees or assigns, of any real estate forfeited for any cause to the State of West Virginia, may at any time during the pendency of the suit for the sale thereof, and before a decree for the confirmation thereof has been made and entered by the court, file his petition therein in manner and form as provided in the next preceding section in relation to the excess of the proceeds of such sale, praying to be allowed to redeem so much only of such real estate as to which the title still remains in the State; and upon the filing of such petition, and upon such proof being made as would entitle the petitioner to the excess of the purchase-money of such real estate if the same had been sold, the court may by a proper decree, permit the petitioner upon the payment into court or to the commissioner of school lands, the costs, taxes and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in the petition. And upon such payment being made aforesaid the court shall enter its decree declaring the redemption of the real estate by the petitioner, so far only as the title thereto is in the State, as provided in this chapter, and so far as the petitioner has

shewn entitled to redeem the same; which decree shall operate as a release of such forfeiture of said real estate to the extent declared therein, and of all former taxes and interest charged and chargeable thereon. And such petitioner shall acquire no other title to the land redeemed than was vested in him immediately before such forfeiture, but such redemption shall in nowise affect or impair any right, title or interest any person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of section three of article thirteen of the constitution of this State."

So, it appears from the Code of West Virginia that ample provision is made by the statutes of that State for the ascertainment and registration of all the land in that State for assessment and taxation. Certain officers are charged with the duty of listing all the real estate within their respective counties which is subject to taxation, of returning such lists to the collectors of taxes, and also to the auditor of the State. These lists are arranged alphabetically in the names of the owners of the lands, so far as such owners are known; but, even despite all the precautions which have been contrived, it has always happened that many tracts of land lying in sparsely inhabited counties and in the mountain ranges escape discovery by the officers, and so escape taxation.

The State may not know of the existence of the tracts of land which its officers have failed to discover, but the owners of these tracts must be conclusively presumed to know of the land owned by them, and it is to their selfish interest that the State should remain in ignorance of these subjects of taxation and they be thereby relieved from bearing their contributive share of the common burden of State taxes. To meet this condition and to make it to the interest of the land-owner not to evade, but voluntarily to assume, his share of the taxes have the States of Virginia and West Virginia required that every land-owner within their respective borders shall examine the land books of the counties where

his lands may lie and ascertain from these public records whether or not his lands are therein listed for taxation, and if from any cause they have been omitted from the land books he shall give them in to the proper officer to be listed and taxed, and if such land-owner fail for five successive years to have his land placed upon the land books of the county where the land lies, then the title to the land so omitted passes absolutely to the State, and this without any judicial proceedings or proceeding in the nature of office found. The fact of omission for the period prescribed is one patent of record and admits of no denial. Of course, where fraud or mistake or any other ground for purely equitable relief exists that court is always open for the redress of such wrongs; but the forfeiture to the State results from the omission at the instant of the expiration of the period prescribed. It may be subsequently avoided upon sufficient grounds and in the proper forum, and adequate remedies are especially provided in the statutes above recited for the recovery from the proceeds of sale of the excess above the amount of taxes, interest, and costs, and also for the redemption of the land and for the full and complete protection of all his interests in the subject-matter of the suit.

So that it appears that the statutes of West Virginia subject the lands within that State to taxation under a uniform system, operating equally upon all persons, classes, and interests. They prescribe with precision the times, places, and offices at and by whom the assessment of lands must be made. They require the owners of lands which are not already entered upon the land books to cause the same to be entered therein. They denounce the penalty which will fall, *proprio vigore*, upon all land-owners who for five years disobey this requirement of the law. They prescribe how, upon the discovery of such disobedience and persistent recusancy, the lands so forfeited may be sold for the benefit of the public school fund, viz., by suit in chancery, brought and proceeded with as in other chancery cases. They pro-

vide for the appearance by petition in such chancery cause of the land-owner to assert his interests and have the same protected, with the right of appeal to the court of last resort in the State.

Nor is this policy of protecting the interests of the State and of her people by forfeiting to the State the land of those persons who in the face of the law persist for so long a time in refusing to bear their share of the common burden of taxation a novel or a strange doctrine. For more than a century it was observed and enforced in the mother State of Virginia, and her courts throughout that period have sustained both its constitutionality and its propriety. Her people and those of West Virginia have lived under no other system.

## DUE PROCESS OF LAW.

On the trial of the cause the court below had instructed the jury that the title to the land claimed by the plaintiff had, prior to the deed under which plaintiff claimed, been forfeited to and vested in the State of West Virginia under the provisions of the constitution of the State. The plaintiff in error assigns as error (Record, p. 33) that "the said provision of said State constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to land out of the owner and vest the same in the State for the failure of the owner of such land to cause the same to be entered upon the land books *are wanting in due process of law*, and are repugnant to and in conflict with article XIV, section 1, of the amendments to the Constitution of the United States."

"Due process of law" is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land (*Waite, C. J.*, in *Walker vs. Sauvinet*, 92 *U. S.*, 93).

It "refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at pleasure. * * * It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law" (*Hurtado vs. California*, 110 *U. S., C.*). "*The principles*, then, upon which the process is based are to determine whether it is 'due process' or not, and not any consideration of *mere form*" (*Cooley, Con. Lim.*, 356). "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters—that is, by process or proceedings adapted to the nature of the case. "The great purpose of this requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." (*Dent vs. West Virginia*, 129 *U. S.*, 124.)

AS APPLIED TO TAXATION AND ITS INCIDENTS.

The clause recited from Magna Charta does not imply the necessity for *judicial* action in every case in which the property of the citizen may be taken for the public use. On the contrary, a *legislative* act for that purpose, when clearly within the limits of legislative authority, is of itself the law

of the land, and an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. (*Cooley on Taxation, 1st ed., page* 38.)

"The existence of government, depending on the prompt and regular collection of revenue, must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct, and if the officers entrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue." (*Taylor, Ch. J.*, in *Cowles vs. Brittain*, 2 *Hawks*, 207, cited in Cooley on Taxation, p. 39.)

"As to this safeguard of 'the law of the land' in tax proceedings, neither the practice of governments nor the decisions of courts warrant us in saying that it includes a judicial finding of delinquency before a sale can be made. It means, beyond any question, regular and orderly proceedings under the general law by the proper department of government, and means nothing more." (*Cooley on Taxation, p.* 41, *note.*)

"The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages or in subordination to the principles which underlie them." (*Bell's Gap R. R. vs. Pennsylvania*, 134 U. S., 239.)

"Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial

proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where the title or possession of property is involved, but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether the notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable." (*Hagar vs. Reclamation District*, 111 *U. S.*, 701.)

In *Palmer vs. McMahon*, 106 *N. Y.*, the court of appeals of New York said:

"The proceedings by which taxes for governmental purposes are assessed, levied, and collected from the citizen are administrative and not judicial in their character and constitute due process of law within the meaning of the Constitution. Such proceedings have from necessity been exercised by governments during all times by summary methods of procedure, and to require the deliberation and delay incident to judicial proceedings in the exercise and enforcement of the tax power of the Government would seriously cripple its efficiency if not destroy its existence. Those methods were in existence and exercise long before the adoption of the constitution and have never been supposed to be affected thereby."

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made (*Hagar vs. Reclamation District, supra*), and "it has been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient." (Kentucky Railroad Tax Case, 115 U. S., 331.)

"Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to the matter, is and always has been due process of law." (*Kelly vs. Pittsburg*, 104 *U. S.*, 80.)

It is not essential, then, to the process or proceeding under which land is taken, its title divested from the former owner and vested in the State because of the failure of such owner to contribute his portion of the common burden of taxation, that there should be personal service of process, or indeed any other process than the notice which the general statute law of the State affords, through the public records and the public offices and agencies. It is enough that such process or proceedings are established by custom, usage, or positive law; that they are general and uniform in their operation and not confined to any particular class, section, or interest, nor dependent for their exercise upon the arbitrary will or the caprice of the officers or agents of the State.

Taxation is necessary in all societies to produce the means by which the very existence of the society may be maintained. All members of society are subject to such taxation, either as to their persons or their property, or both. The legislative branch of government alone is charged with the responsibility and the power of determining the subjects, the rates, and the proceedings for the assessment and the collection of taxes, and within constitutional limits the determination of the legislature is conclusive.* Where the subjects of taxation are known, visible, and within the reach of the officers of the law the taxes may be assessed directly upon them and they may be taken under distress or levy in satisfaction of the taxes assessed, but where such subjects are not known, or apparent, to the assessing officers resort is had to the person sought to be taxed to ascertain from him what property he has which is properly subject to taxation,

* Williams v. Supervisors of Albany, 122 U. S. 164

the existence and value of which lies within his own knowledge alone, such as income, choses in action, and any other property which has escaped the vigilance of the assessor. It may also happen, as, indeed, appears in this case, that property subject to taxation exists in the community, but neither its existence nor the name or residence of its owner is known to the assessing officer. In such case the community is without remedy, unless it can devise and employ some drastic measure which will make it more to the interest of such property-owner to declare himself and his property and submit to taxation than to continue his concealment and consequent evasion of the tax. The remedy which experience has shown to be most efficient is the provision by general statute that where one having property subject to taxation, the existence of which is unknown to the assessor, fails for a given length of time to have such property listed for taxation, it shall stand forfeited to the State, the neglect of the owner for such a length of time being conclusively taken as an abandonment of the property by him and a relinquishment of all title and claim thereto to the State.

As has been said, "There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will direct" (*Cooley on Taxation, p.* 39); and in *United States vs. Repentigny*, 5 *Wallace*, 267, where a large domain had been granted to Repentigny in 1750 by France on implied conditions of cultivation and residence, and it was contended that the United States had under the treaty of 1783 with Great Britain succeeded to all the rights that existed in the King of France, and that this domain had reverted to the King of France for breach of conditions. It was objected that no reunion to the royal domain could be asserted except by a judicial determination, but this court said:

"We think, upon the proofs in the record, this may well be doubted in the case of such prolonged neglect to conform

to the conditions of settlement, as in the instance before us it furnishes cogent if not irresistible evidence of the abandonment of the duties and obligations arising out of the conditions of the grant, and, consequently, of the grant itself, and invites a direct resumption by the sovereign, the lord paramount."

May it not reasonably be presumed, as against one who for a period of five years fails to give in his land to be listed for taxation, that he abandons it and relinquishes to the State his claim to title?

FORFEITURE OF LAND UNDER THE WEST VIRGINIA LAWS FOR FAILURE ON THE PART OF THE OWNER TO HAVE THE SAME ENTERED ON THE LAND BOOKS.

The constitution of West Virginia, article 13, section 6, provides:

It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such land books with State taxes on said land, then, *by the operation hereof*, the land shall be forfeited and the title vested in the State.

So the forfeitures took effect "by the operation hereof" of the constitution, and no legislation was needed to carry the constitution into effect; but by section 39 of chapter 31 of the Code of West Virginia it was provided:

It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with the State taxes on said lands, then by the operation of law, and without

any proceeding therefor, the land shall be forfeited and the title thereto vested in the State.

Here, then, is the plain duty expressly laid upon every land-owner to have his land entered on the land books and thereby cause himself to be charged with the taxes therefor, and here, too, is the clear admonition that if he fail for five successive years to so subject his land for taxation it shall stand, *ipso facto*, forfeited to the State.

This is not a cause of action pursued against some persons and not against others or one the execution of which is left to the arbitrary will or caprice of certain officers or agents of the State, but it is a general law of uniform application in the State, and, from the necessity of the case, is self-executing. The fact must appear from the land book that the land is entered therein; if such fact does not appear, then, without more, that land stands forfeited to the State. What land? Any and all land of one thousand acres or more within the limits of the State which for five successive years has not been entered on the land book. When any tract of land of this description is discovered and the land book for five years past discloses no entry of such tract therein, it stands forfeited without inquest, finding, or judicial proceeding of any sort or kind. The due process of law begins with the enactment and publication of the statute. All land shall be entered for taxation, and all land remaining not entered for five successive years stands forfeited to the State. It continues as a standing admonition to all delinquents through the period of five years, and then the doom of forfeiture follows by operation of law. No further provision need be made by the legislature for the relief of the delinquent. He has had notice of time and place, and no more can he in justice demand. The statute and the constitution both admonish him as to the time, and the land books are part of the public records of each county and are by law deposited in the clerk's offices

of each county and in the office of the auditor of the State, and they, at all times open to his inspection, show him that his land is not and has not been entered in them; but the statutes of West Virginia, in tender consideration for the delinquent land-owner, go much further for his relief. His land stands forfeited by operation of the law, but he may apply in turn to the clerk of the county court, then to the county court in term, with the right of appeal from its judgment, and, if he has gone beyond the five years, he may report the facts to the commissioner of public school lands, who is required by law to file a bill in equity, under which all questions bearing upon the rights of the parties may be determined. The statutes are referred to and in the main recited in the briefs of other counsel for defendant in error here.

NO INQUEST OF OFFICE OR OTHER PROCEEDING NECESSARY TO ENFORCE A FORFEITURE UNDER THESE LAWS.

The legislature, to be sure, cannot take the land of A and give it to B. It cannot take the land of A for any public use without giving him just compensation therefor and taking it in the manner prescribed by law.

But if for any legal cause a man's land is forfeited to the State "a legislative act directing the possession and appropriation of the land is equivalent to office found" (*U. S. vs. Repentigny*, 5 *Wall.*, 268). "A forfeiture by the State of an interest in lands and franchises granted for the construction of a public work may be declared for non-compliance with the conditions annexed to their grant or to their possession when the forfeiture is provided by statute without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. (*Farnsworth, &c., vs. Minn. & Pac. R. R. Co.*, 92 *U. S.*, 66; also *Bybee vs. O. & C. R. R. Co.*, 139 *U. S.*, 675, and *A. & P. R. R. Co. vs. Mingus*, 165 *U. S.*, 435.)

But this, as well as all the other questions presented here for consideration, has been settled for more than half a century in Virginia by the decisions of the court of appeals of that State.

In *Wild's Lessee vs. Serpell*, 10 *Grattan*, 408, Judge George Lee, who was distinguished above all his fellows for the accuracy and fullness of his learning in the law of real property, especially in its application to the tenures in Virginia, said after referring to certain decisions of that court:

"The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case no judgment or decree or other matter of record nor any inquest of office is necessary, but that the statutes themselves of their own force and by their own energy work out their own purpose and operate effectually to divest the title out of the defaulting owner and perfectly to vest it in the Commonwealth without the machinery of any proceeding of record or anything in the nature of an inquest of office. * * * Upon these subjects I have nothing to say upon this occasion except that, considering the peculiar condition of things in that part of the State lying west of the Allegheny mountains and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable."

Reliance appears to be placed by counsel for plaintiff in error in his brief (page 50) on the opinion of the elder Judge Tucker, in *Kinney vs. Beverley*, 2 *Hen. & Mumford*, 318, in which the construction of "An act to dispose of waste and unappropriated lands in the Commonwealth of Virginia on the *eastern* waters" was considered and applied, under which that learned judge expressed a doubt as to whether an inquest of office was not required; but that doubt does not appear to have been shared in by his two associates on the bench who delivered opinions, and there may have been room for doubt, under the language of that act, whether the

act was self-executing. So, too, in *Fairfax's Devisees vs. Hunter's Lessees*, 7 *Cranch*, 702, it appeared that the lands which had been granted by the governor of Virginia to Hunter had never been escheated and seized into the hands of the Commonwealth, as distinctly required by the act of assembly concerning escheators, and had never been the subject of any inquest of office. The court, after stating the principles of the common law as to the necessity of office found and possession, says:

"If there be no act of Virginia altering the common law, they would control;" but adds: "We will not say it was not competent for the legislature (supposing no treaty in the way) by a special act to have vested the land in the Commonwealth without an inquest of office for the cause of alienage."

It then proceeded to show that the confiscation acts of Virginia, so far from dispensing with the requirements of the common law, rather add to their strictness; for the act of May, 1779, ch. 45, expressly required an inquest of office before seizure, and forbade the issuing of a grant for twelve months after the return of the inquisition, and the difference between the Virginia act and the Maryland acts of 1780 is illustrated in the case of *Smith vs. State of Maryland*, 6 *Cranch*, 286.

The following decisions in Virginia and West Virginia, while not conclusive authority here, are yet convincing as to the reasons given for the conclusions reached. *Staats vs. Board*, 10 *Grattan*, 400; *Hale vs. Branscom*, 10 *Grattan*, 418; *Smith vs. Chapman*, 10 *Grattan*, 469; *Levasser vs. Washburn*, 11 *Grattan*, 580; *Usher vs. Pride*, 15 *Grattan*, 199; *McClure vs. Maitland*, 24 *West Virginia*, 573; *McClure vs. Maupertuis*, 29 *West Virginia*, 641; *Coal Co. vs. Howell*, 36 *West Virginia*, 501. And these cases have been followed by the Federal courts in *Reed vs. Dingess*, 60 *Federal Reporter*, 26; 8 *C. C. A.*

HOLMES CONRAD,
*Of Counsel for the Defendants in Error.*

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# KING *v.* MULLINS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 157. Argued March 22, 23, 1898. — Decided May 31, 1898.

The system established by the State of West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State.

As ne ther the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887 and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the State was not displaced or discharged, and the Circuit Court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain this action of ejectment.

*Reusens* v. *Lawson*, 91 Virginia, 226, approved and followed to the point that "In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person,

It is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the Commonwealth for the non-payment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth."

THE case is stated in the opinion.

*Mr. Maynard F. Styles* for plaintiff in error.

*Mr. Z. T. Vinson* and *Mr. Holmes Conrad* for defendants in error.

*Mr. W. E. Chilton* and *Mr. James H. Ferguson* filed briefs for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action of ejectment was brought to recover that part lying in the State of West Virginia of a tract of 500,000 acres of land patented by the Commonwealth of Virginia in 1795 to Robert Morris, assignee of Wilson Cary Nicholas.

The persons sued were very numerous, but M. B. Mullins, Alexander McClintock and John McClintock having elected to sever in their defence from other defendants, the case was tried only as between them and the plaintiff King.

At the trial in the Circuit Court the plaintiff introduced in evidence the patent to Morris showing that the lands therein described were granted without conditions. Evidence was also introduced tending to show that by sundry mesne conveyances and legislative and judicial proceedings the title of Morris became vested, in 1866, in Robert Randall, trustee; in John R. Reed, trustee, on the 29th day of June, 1886; and through sundry mesne conveyances by Reed, trustee, David W. Armstrong and John V. LeMoyne in the plaintiff King on the 27th day of December, 1893.

The defendants resisted the claim of the plaintiff upon the general ground that prior to the date of the deed from LeMoyne, the lands embraced in the patent were absolutely forfeited to the State, and were so forfeited when the present action was instituted.

To show an outstanding title in the State to the lands in dispute by forfeiture, the defendants read in evidence a certificate of the auditor of the State, dated October 29, 1895, showing that neither Randall, trustee, nor Reed, trustee, nor LeMoyne, King, Armstrong and others named, had entered on the land books of Wyoming, McDowell, Logan, Boone or Mingo counties, or either of them, for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893 and 1894, or either of them, a tract of 500,000 acres of land, nor paid taxes upon the land for any of those years. The certificate further stated that the tract of 500,000 acres was not entered on the books of the assessor in any of those counties for any of the years named; that no land was entered on the assessor's book in the name of any of said parties for any of those years; and that none of the above persons are charged on the land books with state taxes on any part of those lands.

We assume from the record that the greater part at least of the lands in West Virginia embraced in the Morris patent are in the above-named counties.

The defendants, further to maintain the issues on their part, offered in evidence —

1. A certified copy of the order of the Circuit Court of Wyoming County, West Virginia, (in which county part of the original tract was situated,) showing the appointment and qualification, on the 18th day of April, 1890, of E. M. Senter, commissioner of school lands for that county.

2. Also the annual report made by that officer to the Circuit Court of Wyoming County, March 31, 1894, and filed, of all tracts and parcels of land liable to be sold for the benefit of the school fund, as required by section 5 of chapter 105 of the Code of West Virginia, as amended by the act of the legislature of 1893, chapter 24. That report gives the list of various tracts in the county of Wyoming "heretofore purchased for the State at sales thereof for delinquent taxes and not redeemed within one year or within the time required by law, made up from the records in the auditor's office and certified by the auditor to the clerk of the Circuit Court to be sold by the commissioner of school lands." The report also

states: "Said commissioner of school lands would further report that in the annual report of the commissioner of school lands for the year 1889 there was reported for sale for the benefit of the school fund 50,000 acres, forfeited in the name of the Pittsburgh National Bank of Commerce, and sold on the — day of —— for the non-payment of the taxes due thereon for the years 1883 and 1884, and purchased by the State. . . . The commissioner of the Circuit Court who was appointed to report upon proceedings heretofore instituted to sell the lands of said Pittsburgh National Bank of Commerce and Smith and Fougeray reported them a part of 500,000 acre survey, Robert Morris patent, known as the 'Robert E. Randall land,' and that a suit was pending in the Circuit or District Court of the United States for the District of West Virginia, and that proceedings to sell the same under said formal proceedings had been enjoined. Said commissioner is advised that an error was made in said matter, and that no suit was pending in said United States court with reference to said 500,000 acre survey. The said commissioner of school lands would further report that it has come to his knowledge from Henry C. King, the present owner and claimant thereof, that a tract of 500,000 acres of land, lying partly in this county and partly in the counties of Logan and McDowell, and the greater portion in the States of Virginia and Kentucky, was at the April term, 1883, of the Circuit Court of this county redeemed from a former forfeiture by Robert E. Randall, trustee, and all the taxes thereon paid prior to and including the year 1883; that since said redemption the said land has been omitted from the land books of this county for five consecutive years, to wit, for the years 1884, 1885, 1886, 1887 and 1888, and thereby the same has been forfeited to the State in the name of Robert E. Randall, trustee. The said commissioner of school lands further reports that each of said tracts hereinbefore mentioned are liable to be sold for the benefit of the school fund of this State on account of the forfeiture herein stated; all of which is respectfully submitted."

3. A certified copy of an order of the Circuit Court of

Logan County, West Virginia, made April 1, 1889, showing the appointment of U. B. Buskirk as commissioner of school lands of that county, and his annual report, as such commissioner, of all tracts and parcels of land in Logan County theretofore reported for sale for the benefit of the school fund to the clerk of the Circuit Court of that county under sections 1 and 2 of chapter 105 of the Code of West Virginia, and all lands in that county not theretofore reported, which in his opinion were liable to sale for the benefit of that fund.

4. A certified copy of an order of the Circuit Court of Logan County, West Virginia, ordering suit to be brought in the name of the State for the sale of the lands mentioned in the report of Commissioner Buskirk.

The defendants having rested their case, the plaintiff to prove that no forfeiture of the land or outstanding title thereto existed or was claimed by the State of West Virginia, and that there was no record of any forfeiture where the same would be found if it existed, introduced and read in evidence a certificate of the auditor of the State, dated October 30, 1895, certifying that he had carefully examined the record books of forfeited lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such books a tract of 500,000 acres of land, or any part thereof, or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee, A. D. Maupertures, John R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong, or Henry C. King; that there were no lands from any of those counties entered on the record of forfeited lands of his office for either of those years, in the name of either or any of those parties; that he had carefully examined the record books of delinquent lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such record books a tract of 500,000 acres of land or any part thereof or any other tract delinquent for

any cause in the name of either Robert E. Randall, Robert E. Randall, trustee, A. D. Maupertures, John R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong or Henry C. King; and that there were no lands from any of those counties entered on the record of delinquent lands of his office for either or any of those years in the name of either or any of those parties.

The plaintiff further offered evidence tending to prove that all taxes of the State of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claimed title, and proved further that plaintiff was a purchaser of said tract for a valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in West Virginia, or of any of the facts set out in the auditor's certificate, shown and referred to in plaintiff's bill of exceptions, except such notice as the land books and records duly kept disclosed.

At the instance of the defendants the court instructed the jury "that the title to the land claimed by the plaintiff, granted to one Robert Morris by the Commonwealth of Virginia, by patent dated June 23, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To this instruction the plaintiff objected upon the ground that the provisions of the constitution of West Virginia for the forfeiture of lands were repugnant to the Fourteenth Amendment of the Constitution of the United States, and to Article 3, sections 4, 5, 9, 10, 20, and Article 5, section 1, of the state constitution; and upon the further ground that if there were a forfeiture of said land to and an outstanding title in the State, such title could not be set up against the plaintiff in this action, he being a purchaser for value without

knowledge or notice of such forfeiture or of such outstanding title.

The plaintiff's objection having been overruled, and a verdict having been rendered by direction of the court for the defendants, judgment was entered that the plaintiff take nothing by his action.

The controlling question in this case relates to the validity under the Constitution of the United States of certain provisions in the constitution and statutes of West Virginia for the forfeiture of lands by reason of the failure of the owners during a given period to have them placed upon the proper land books for taxation.

The constitution of West Virginia provides that all private rights and interests in lands in that State derived from or under the laws of Virginia, and from or under the constitution and laws of West Virginia prior to the time such constitution went into operation, should "remain valid and secure, and shall be determined by the laws in force in Virginia prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect." Art. XIII, § 1.

In view of this provision it is proper to look at the legislation of Virginia and the decisions of its highest court touching the forfeiture of lands for non-compliance by the owners with the requirements of the law relating to taxation.

By the first section of an act of the General Assembly of Virginia, passed February 27, 1835, further time was given until July 1, 1836, for the redemption of all lands and lots theretofore returned as delinquent for the non-payment of taxes, *west of the Alleghany Mountains*, and which had become vested on the previous 1st day of October in the president and directors of the Literary Fund; saving the title of any *bona fide* occupant claiming under a junior grant, whose rights were protected and secured under prior legislation.

That act further provided:

"And whereas it is known to the general assembly that many large tracts of lands lying west of the Alleghany Mountains which were granted by the Commonwealth before the

first day of April, 1831, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

"2. *Be it enacted*, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, 1836, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the Commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the Commonwealth, after the 1st day of July, 1836, except only as hereinafter excepted.

"3. That all right, title and interest which may hereafter be vested in the Commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bona fide* claimed, held or derived from or under any grant of the Commonwealth bearing date previous to the 1st day of April, 1831, who shall have dis-

charged all taxes duly assessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her or their title thereto, whether legal or equitable; *Provided*, That nothing in this section contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the Commonwealth for the same land and have regularly paid the taxes thereon, but in all such cases the parties shall be left to the strength of their original titles." Laws Va. 1834–35, c. 13, pp. 11–13.

Other acts were passed in Virginia relating to delinquent and forfeited lands and extending the time for redemption, all of them proceeding upon the ground that the State had the power to forfeit lands for failure to have them charged with taxes as well as for failure to pay the taxes so charged.

The first case in which the Supreme Court of Appeals of Virginia had occasion to pass upon the validity of the above statute of 1835, so far as it forfeited lands which the owner failed to have put on the proper land books and pay taxes upon, was *Staat's Lessee* v. *Board*, 10 Gratt. 400, 402, decided in 1853. That court said: "It further seems to the court that, as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed from the 1st day of November, 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the act of February 27, 1835, the forfeiture became absolute from and after the 1st of November, 1836. That the provision of the act of March 30, 1837, giving time for redemption until the 15th of January, 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming. And it further seems to the court that such forfeiture became *absolute* and *complete* by the failure to enter and pay the taxes thereon in the manner prescribed by the act of 27th of February, 1835. And *no inquisition or judicial proceedings or inquest, or finding of any kind, was required to consummate such forfeiture.*"

Opinion of the Court.

The same principle was announced in *Wild's Lessee* v. *Serpell*, 10 Gratt. 405, 408 (1853). The court said: "That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and, where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law, and, in case of failure so to do, forfeiting to the Commonwealth all right and title whatever of the parties in default, (under the modifications and restrictions provided by the acts,) are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staat's Lessee* v. *Board*, 10 Gratt. 400; *Smith's Lessee* v. *Chapman*, 10 Gratt. 445. The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, *of their own force and by their own energy*, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the Commonwealth, *without the machinery of any proceeding of record, or anything in the nature of an inquest of office.* And as the title is thus in a proper case divested out of the owner and vested in the Commonwealth by the operation of the statutes, so where the forfeiture enures to the benefit of a third person, claiming under the Commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like manner, perfect and complete without any new grant from the Commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the State lying west of the Alleghany Mountains, and the serious check to population and the improvement of the country

and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional powers of the legislature to enact them was clear and unquestionable." This case was cited in *Armstrong* v. *Morrill*, 14 Wall. 120, 134, which was an action of ejectment brought prior to the adoption of the Fourteenth Amendment of the Constitution of the United States, and in which therefore the rights of the parties must have been determined without reference to the prohibition in that amendment against the deprivation of property without due process of law.

In *Levasser* v. *Washburn*, 11 Gratt. 572, 580–581, (1854) it was said: "According to the decisions of this court in the cases just referred to, and also in the cases of *Wild* v. *Serpell*, 10 Gratt. 405, and *Smith's Lessee* v. *Chapman*, 10 Gratt. 445, the Circuit Court also erred in its opinion as to the time at which the forfeiture under the Girond grant occurred or became complete. It appears to have proceeded on the notion that some inquest of office, or decree, or other proceeding should have been had in order to declare and perfect the forfeiture. Nothing of the kind was necessary. The act of the 27th of February, 1835, Sess. Acts, p. 11, declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same, except such as might be released by law, was intended *by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding or finding of any kind, in order to consummate it.* It was perfectly within the competency of the legislature to declare such forfeiture and divest the title *by the mere operation of the act itself*, and the whole legislation upon the subject of delinquent and forfeited lands plainly manifests the intention to exercise its power in this form." See also *Usher's Heirs* v. *Pride*, 15 Gratt. 190, and *Smith* v. *Tharp*, 17 Gratt. 221.

In this connection it may be well to refer to *Martin* v. *Snowden*, 18 Gratt. 100, 135–136, 139–140, (1868) in which the Supreme Court of Appeals of Virginia had occasion to

determine, as between the parties before it, the effect of the provisions in the acts of Congress of August 5, 1861, 12 Stat. 292, c. 45, and June 7, 1862, 12 Stat. 422, c. 98, relating to the direct taxation of lands. By the latter act it was provided that "the title of, in and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States," and that "upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever." § 4. One of the questions presented in that case was, whether the first of the clauses just quoted worked, *proprio vigore*, a transfer to the United States of the title to the land declared to be forfeited. The court held that the acts of Congress did not and were not intended to create such a forfeiture of the land to the United States as that it ceased *ipso facto* to be the property of the former owner and became the absolute property of the United States; that Congress was without constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes; that Congress had all the powers for enforcing the collection of its taxes that were in use by the Crown in England, or were in use by the States at the time of the adoption of the Constitution, but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax. Referring to *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, the state court further said: "Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as 'due process of law,' upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law and without any process or proceeding whatever, except the ascertainment by the commissioners of the sum chargeable on the land. But that is probably immaterial. The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England at any period of its history for enforcing the payment of taxes or other debts to the Crown. If it had been, we should have

found such forfeitures treated of in the English law books; but we nowhere find them mentioned." Again: "These references will show what were the ordinary methods of enforcing the payment of taxes in use in Virginia about the time of the adoption of the constitution. And it may be worth mentioning, that before the adoption of the Constitution of the United States the legislature of Virginia had reënacted the provision of Magna Charta, that no freeman shall be taken or imprisoned, or be deprived of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the Commonwealth pass upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land. 12 Hening's St. at L. c. 81, p. 186. Looking at the spirit which animated all this legislation, we cannot doubt as to what would have been thought, at that day, of a statute declaring an immediate and absolute forfeiture of the whole land as a penalty for the non-payment of the tax within sixty days after the assessment of it, without notice to the owner, by advertisement or otherwise, of the assessment, and without any, even the least, effort to collect it."

The case of *Martin* v. *Snowden* was brought here and is reported under the title of *Bennett* v. *Hunter*, 9 Wall. 326, 335–337, (1869). This court did not deem it necessary in that case to decide whether the United States could constitutionally take to itself the absolute title to lands merely because of the non-payment of taxes thereon within a prescribed time, and without some proceeding equivalent to office found. Speaking by Chief Justice Chase, it said: "We are first to consider whether the first clause of this section, *proprio vigore*, worked a transfer to the United States of the land declared to be forfeited. The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue, to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of rebellion rather

than to revenue. But this purpose did not affect the operation of the act before sale, for until sale actually made there could be, properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt. And it seems unreasonable to give to the act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien. The first clause of the act, therefore, is not to be considered as working *an actual transfer of the land to the United States*, if a more liberal construction can be given to it consistently with its terms. *Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer.* Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 625. In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office. 3 Bl. Com. 258. And so of other instances where the title of the sovereign was derived from forfeiture." Again: "Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public act of the government in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of title. The title, indeed, was forfeited by non-payment of the tax; in other words, it be-

came subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States."

We now come to an examination of the West Virginia constitution and statutory provisions relating to the forfeiture to the State of lands subject to taxation.

By Article XIII of the constitution of West Virginia of 1872 it was provided:

"4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the Circuit Court of the county in which the lands or a part thereof, are situated, be sold to the highest bidder.

"5. The former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter.

"6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. *When for any five successive years after the year* 1869 *the owner of any tract of land containing one thousand acres or more shall not have been charged on such books with state tax on said land, then by operation hereof the land shall be forfeited and the title thereto vest in the State.* But if, for any one or more of such five

years the owner shall have been charged with a state tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: *Provided*, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited." The duty imposed upon owners of land by the first clause of this section was also prescribed by the statutes of the State.

Such being the provisions of the constitution of West Virginia in relation to the forfeiture of lands, the Supreme Court of Appeals of that State had occasion in *McClure* v. *Maitland*, 24 W. Va. 561, 575–578, to determine their scope and effect. In that case it was said: "In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the Commonwealth of Virginia now embraced within this State were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement and population of the State to an almost inconceivable extent. In this emergency and to remedy this calamitous evil, the general assembly of Virginia inaugurated the system of delinquent and forfeiture laws that form the basis of the provisions of our present constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the legislature, the judiciary and the people, speaking through our present constitution, to destroy and annihilate the titles of such delinquent

owners, who should, after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and these not in default. The purpose of the statutes passed to enforce this system was not merely to create a lien for the taxes on these delinquent and unoccupied lands, but to effect *by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes.* The constitutional competency of the legislature to pass these laws and thus consummate the forfeiture and perfectly divest all the right, title and interest of the former owner by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the Court of Appeals of Virginia" — citing *Staats* v. *Board*, 10 Gratt. 400; *Wild* v. *Serpell*, 10 Gratt. 405; *Levasser* v. *Washburn*, 11 Gratt. 572; *Usher* v. *Pride*, 15 Gratt. 190 and *Smith* v. *Tharp*, 17 W. Va. 221.

So in *Coal Co.* v. *Howell*, 36 W. Va. 489, 501, the court referred to its former decisions, above cited, and after observing that they had been adhered to with only a seeming exception, said: "The forfeitures became complete and absolute by operation of law — in the case of delinquent lands on the 1st day of October, 1834, and in the case of omitted lands on November 1, 1836, *and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such forfeiture.*"

Now, the plaintiff contends that the provision in the constitution of West Virginia which forfeits and vests absolutely in the State without inquisition of record, or some public transaction equivalent to office found, the title to lands which for five successive years after 1869 have not been charged with state taxes on the land books of the proper county, is repugnant to the clause of the Fourteenth Amendment of the Constitution of the United States declaring that no State shall deprive any person of his property without due process of law.

In support of this contention numerous authorities have

been cited by the plaintiff, those most directly in point being *Griffin* v. *Mixon*, 38 Mississippi, 424, (1860) and *Marshall* v. *McDaniel*, 12 Bush, 378, 382–5, (1876). In the first of those cases, the High Court of Errors and Appeals of Mississippi, speaking by Judge Harris, held a statute of that State declaring the forfeiture of lands on the failure simply of the owner to pay the taxes due thereon, without notice or hearing in any form, to be in violation of the constitutional provisions prohibiting the taking of private property for public use without just compensation being first made therefor, or the deprivation of property without due process of law. In the other case, the Court of Appeals of Kentucky held to be unconstitutional a provision in a statute of that State declaring "that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the State, the title of such lands shall vest in this Commonwealth by virtue of this act without any inquest of office found, unless said land shall have been redeemed according to law." That court, speaking by Chief Justice Lindsay, said: "In pursuing this inquiry we need not call in question the power of the legislature to provide for the levy and collection of taxes in the most summary manner. The right of the Commonwealth, through its executive and ministerial officers, to assess property for taxation, to ascertain the sum payable by each taxpayer, and to seize and sell his property in satisfaction of such sum, is not open to doubt. It is equally clear the legislature may impose upon the taxpayer the duty of listing his property for taxation, and may prescribe, for the neglect of the duty so imposed, penalties reaching even to the forfeiture of the estate not listed. But when such laws are enacted, the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made and the commission of the offence ascertained by 'due course of law.' . . . 'To enjoin what shall be done or what left undone, and to secure obedience to the injunction by appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty belongs to the judicial function.' *Gaines* v. *Buford*, 1 Dana, 481.

By the Magna Charta it is declared that no citizen shall be disseized of his freehold or be condemned but by the lawful judgment of his peers or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defence. . . . We conclude without hesitation that so much of the act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void."

The question of constitutional law thus presented is one of unusual gravity. On the one hand, it must not be forgotten that the clause of the National Constitution which this court is now asked to interpret is a part of the supreme law of the land, and that it must be given full force and effect throughout the entire Union. The due process of law enjoined by the Fourteenth Amendment must mean the same thing in all the States. On the other hand, a decision of this court declaring that that amendment forbids a State, by force alone of its constitution or statutes, and without inquisition or inquiry in any form, to take to itself the absolute title to lands of the citizen because of his failure to put them on record for taxation, or to pay the taxes thereon, might greatly disturb the land titles of two States under a system which has long been upheld and enforced by their respective legislatures and courts. Under these circumstances, our duty is not to go beyond what is necessary to the decision of the particular case before us. If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia constitution in question, *alone considered*, is consistent with the national Constitution, that question may properly be left for examination until it arises in some case in which it must be decided.

We come then to inquire whether, looking at the constitution and the statutes of West Virginia together, a remedy

was not provided which, if pursued, furnished to the plaintiff and those under whom he asserts title all the opportunity that "due process of law" required in order to vindicate any rights that he or they had in respect of the lands in question.

We have seen that the lands embraced by the patent to Robert Morris were not put upon the land books of the proper counties during the years 1883 to 1894, both inclusive. They were redeemed in 1883 from forfeiture by Randall, trustee, in whom, as we take it, the title was at that time vested. Let it be assumed that they were again forfeited to the State upon the expiration of the five consecutive years after 1883 during which they were not placed on the land books for taxation; in other words, that for that reason they were forfeited to the State after the year 1888. What, at the time of such forfeiture, were the rights of the owner? Did the statutes of the State give him any remedy whereby he could be relieved from such forfeiture? Was he denied all opportunity to hold the lands upon terms just and reasonable both to him and the State?

We pass by the act of November 18, 1873, providing for the sale of escheated, forfeited and unappropriated lands for the benefit of the school fund, act of W. Va. 1872–73, p. 449, c. 134, and also, for the present, the act of March 25, 1882, on the same subject, acts of W. Va. 1882, p. 253, c. 95, because both of those acts are amendatory of the Code of West Virginia, and their provisions, so far as they directly or indirectly bear upon the present controversy, are preserved and extended in the Code published in 1887, which contained the law of the State in reference to forfeited lands as it was at that time.

From Chapter 105 of the Code of West Virginia, published in 1887, it appears that all lands forfeited to the State for the failure to have the same entered upon the land books of the proper county and charged with the taxes thereon, as provided by law — so far as the title thereof was not vested in junior grantees or claimants under the provisions of the constitution and laws of the State — were *required* to be sold for the benefit of the school fund — the auditor to certify

to the clerk of the Circuit Court a list of all such lands (which, or the greater part of which, were in his county), within sixty days after the title thereto vested in the State. That act made it the *duty* of the commissioner of school lands to file his petition in the Circuit Court and pray for the sale of the lands for the benefit of the school fund. He was required to state in his petition "all the tracts, lots and parts and parcels of any tract or lot of land, so liable to sale, in the Circuit Court of his county, praying that the same be sold for the benefit of the school fund" and, according to the best of his information and belief, "the local situation, quantity or supposed quantity, and probable value of each tract, lot or parcel, and part of a tract of land herein mentioned, together with all the facts at his command, in relation to the title to the same, and to each tract, lot, part or parcel thereof, *the claimant or claimants thereof*, and their residence, if known, and, if not known, that fact shall be stated, and stating also how and when and in whose name every such tract, lot and parcel, and part of a tract or lot, was forfeited to the State." Provision was made for the reference of the petition to a commissioner in chancery, "with instructions to inquire into and report upon the matters and things therein contained, and such others as the court may think proper to direct, and particularly to inquire and report as to the amount of taxes and interest due and unpaid on each tract, lot and parcel, and part of a tract or lot of land mentioned in the petition, in whose name it was forfeited, and when and how forfeited, in whom the legal title was at the time of the forfeiture, and if more than one person claimed adverse titles thereto at the date of the forfeiture, the name of each of such claimants and a reference to the deed book or books in which the title papers of any claimant thereof can be found; what portion or portions, if any, of such lands is claimed by any person or persons under the provisions of section three of article thirteen of the constitution of this State, with the names of such claimants and the amount claimed by each as far as he can ascertain the same." If there were no exception to this report, or if there were any which were overruled, "the court

shall confirm the same *and decree a sale* of the lands, or any part of them, therein mentioned, which are subject to sale, for the benefit of the school fund, upon such terms and conditions, as to the court may seem right and proper; and in any decree of sale made under this chapter, the court may provide that the commissioner of school lands, or other person, appointed commissioner to make such sale, may receive bids for such lands, without any notice of sale; and if the former owner or owners, or person in whose name the land was returned delinquent, and forfeited, or the heirs or grantee of such owner or person, or any person or persons, holding a valid subsisting lien thereon, at the time of such forfeiture, bid a sum sufficient to satisfy such decree and the costs of the proceeding and sale, and such person or persons, so bidding, be the highest bidder, said commissioner shall sell the land on such bid, and report the same to the court for confirmation; but if the commissioner receive no bid from any such person, or if he shall receive a higher bid therefor, from any other person, not so mentioned, then, and in either event, the said commissioner shall sell the land, at public auction to the highest bidder, after first giving such notice, as may be provided by such decree." By the same act it was provided: "The former owner of any such land shall be entitled to recover the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter, as provided in the next succeeding section."

But the part of Chapter 105 of the Code which has the most direct bearing on the question under consideration is section 14, which after providing that the owner may, upon his petition to the Circuit Court, obtain an order for the payment to himself of the excess just mentioned, proceeds: "At any time during the pendency of the proceedings for the sale of any such land as hereinabove mentioned, such former owner, or any

creditor of such former owner of such land, having a lien thereon, may file his petition in said Circuit Court as hereinbefore provided, and asking to be allowed *to redeem such part or parts of any tract of land so forfeited, or the whole thereof*, as he may desire, and upon such proof being made as would entitle the petitioner to the excess of purchase money hereinbefore mentioned, such court may allow him to redeem the whole of such tract if he desire to redeem the whole, or such part or parts thereof, as he may desire, less than the whole, upon the payment into court, or to the commissioner of school lands, all costs, taxes and interest due thereon, as provided in this chapter, if he desire to redeem the whole of such tract; or if he desire to redeem less than the whole of such tract, upon the payment, as aforesaid, of so much of the costs, taxes and interest due on such tract as will be a due proportion thereof for the quantity so redeemed. But if the petition be for the redemption of a less quantity than the whole of such tract, it shall be accompanied with a plat and certificate of survey of the part or parts thereof sought to be redeemed. Whenever it shall satisfactorily appear that the petitioner is entitled to redeem such tract, or any part or parts thereof, the court shall make an order showing the sum paid in order to redeem the whole tract or the part or parts thereof which the petitioner desires to redeem, and *declaring the tract, or part or parts thereof, redeemed from such forfeiture*, so far as the title thereto was in the State immediately before the date of such order; which order, when so made, *shall operate as a release of such forfeiture so far as the State is concerned*, and of all former taxes on said tract, or part or parts thereof so redeemed, and no sale thereof shall be made. If the redemption be of a part or parts of a tract, the plat or plats and certificate of the survey thereof hereinbefore mentioned, together with a copy of the order allowing the redemption, shall be recorded in a deed book in the office of the clerk of the county court. *Provided*, That such payment and redemption shall in no way affect or impair the title to any portion of such land transferred to and vested in any person, as provided in section three of article thirteen of the constitution of this State."

Opinion of the Court.

It thus appears that when the lands in question and others embraced in the Morris patent were, as is contended, forfeited to the State for the failure of the owner during the five consecutive years after they were redeemed by Randall, trustee, in 1883, to have them entered upon the land books of the proper county and charged with the taxes thereon, it was provided by the statutes of West Virginia:

That all lands thus forfeited to the State should be sold for the benefit of the school fund;

That the sale should be sought by petition filed by the commissioner of school lands in the proper Circuit Court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found;

That the petition should be referred to a commissioner in chancery, who should report upon the same and upon such other things as the court might direct, and particularly as to the amount of taxes due and unpaid upon any lands mentioned in the petition, in whose name and when and how forfeited, and in whom the legal title was at the time of the forfeiture;

That if there were no exceptions to the report, or if there were exceptions which were overruled, the court was required to confirm the same and decree a sale of the lands for the benefit of the school fund; and,

That at any time during the pendency of the proceedings instituted for the sale of forfeited lands for the benefit of the school fund, the owner, or any creditor of the owner having a lien thereon, might file his petition in the Circuit Court of the county for the redemption of his lands upon the payment into court, or to the commissioner of school lands, of all costs, taxes and interest due thereon, and obtain a decree or order declaring the lands redeemed so far as the title thereto was in the State immediately before the date of such order.

These provisions were substantially preserved in Chapter 105 as amended and reënacted in 1891 and 1893. Code of West Va. 1891, p. 731; acts of West Va. 1893, p. 57. But in the Code of 1891, act of March 12, 1891, will be found this additional and important provision, Acts 1891, c. 94:

"§ 18. In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine *all questions of title*, possession and boundary which may arise therein, as *well as any and all conflicting claims whatever to the real estate in question arising therein.* And the court, in its discretion, may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And if any such issue be as to the question of title, possession or boundary of the land in question, or any part of it, it shall be tried and determined in all respects as if such issue was made up in an action pending in such court. And every such issue shall be proceeded in, and the trial thereof shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant a new trial therein as in other cases tried by a jury." And this provision was preserved, substantially, in the act of 1893, amendatory of Chapter 105 of the Code of West Virginia.

If, as contended, the State, without an inquisition or proceeding of some kind declaring a forfeiture of lands for failure during a named period to list them for taxation, and by force alone of its constitution or statutes, could not take the absolute title to such lands, still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain the full possession of and title to his lands. We should therefore look to the constitution and statutes of the State together for the purpose of ascertaining whether the *system* of taxation established by the State was, in its essential features, consistent with due process of law. If, in addition to the provisions contained in the constitution, that instrument had itself provided for the sale of forfeited lands for the benefit of the school fund, but reserved the right to the owner, before sale and within a reasonable period, to pay the taxes and charges due thereon, and thereby relieve his land from forfeiture, we do not suppose that such a system would

be held to be inconsistent with due process of law. If this be true it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. This subject was fully considered in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 280, 281, 282, which arose under the act of Congress of May 15, 1820, providing for the better organization of the Treasury Department. The account of a collector of customs having been audited by the first auditor and certified by the first comptroller of the Treasury, a distress warrant for the balance found to be due was issued by the solicitor of the Treasury, in accordance with the act of Congress, and levied upon the lands of the collector. The question presented was whether such a proceeding was consistent with due process of law — the objection to it being that it was judicial in its nature and that it operated to deprive the debtor of his property without a hearing or trial by jury and without due process of law. This court said, among other things: "Tested by the common and statute law of England prior to the emigration of our ancestors and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the Government from a collector of customs, unless there exists in the constitution some other provision which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally

implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, 2 Inst. 47, 50; *Hoke* v. *Henderson*, 4 Dev. N. C. Rep. 115; *Taylor* v. *Porter*, 4 Hill, 140, 146; *Van Zandt* v. *Waddel*, 2 Yerger, 260; *State Bank* v. *Cooper*, 2 Yerger, 599; *Jones's Heirs* v. *Perry*, 10 Yerger, 59; *Greene* v. *Briggs*, 1 Curtis, 311, yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings." Again: "The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know, without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by

systems of fines and penalties, but always in some way observed and yielded to." In *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 239, it was said that "the process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." This must be so, else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes.

In this connection reference may be made to what was said by the Supreme Court of Appeals in *McClure* v. *Maitland*, above cited, touching the rights of the owner of lands forfeited to the State, and for the sale of which proceedings were instituted by the commissioner of school lands. That court said: "The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the State and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper, without consulting the former owner or any one else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the State saw proper to transfer and vest her title to so much of said land owned by her, in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the taxes thereon chargeable to him. . . . The laws, as we have shown, by their own force, transferred to and vested the title to the land absolutely in the State without any judicial inquiry or inquest of any kind. There could,

therefore, be no necessity or reason for proceeding *in rem* against the land. That had already become the absolute property of the State, and she had a perfect right to sell it without further inquiry. All the laws providing for the sale of these lands presuppose the title to have vested in the State prior to the commencement of the proceedings. In fact the whole authority of the commissioner and the jurisdiction of the court are based upon the assumption that the unconditional title is in the State; for unless such is the fact neither has any authority to act. *Twiggs* v. *Chevallie*, 4 W. Va. 463. And all the right, title and interest of the former owner having been completely divested, he has not a particle of interest in the land — no more than if he had never owned it; there is, therefore, no possible reason for making him a party or proceeding against him *in personam* or otherwise. The proceeding is of necessity, then, neither *in rem* nor *in personam;* and as all judicial proceedings properly so styled must belong to either the one or the other of these classes, it follows that this is not and cannot be in any technical sense a judicial proceeding."

It is said that this shows that the taxpayer, after his land is forfeited to the State, is left by the statutes of West Virginia without any right or opportunity, by any form of judicial proceeding, to get it back or to prevent its sale, and, therefore, it is argued, he is absolutely divested of his lands solely by reason of his failure to place them on the proper land books.

An answer to this view is, that what was said in *McClure* v. *Maitland*, on this point, had reference to proceedings under the act of November 18, 1873, acts 1872–73, p. 449, c. 134, which were not judicial in their nature but administrative. But as declared in *Hays, Commissioner*, v. *Camden's Heirs*, 38 W. Va. 109, 110, the act of 1873 was so amended by the act of March 25, 1882, acts W. Va. 1882, p. 253, c. 95, as to make the proceeding in the Circuit Court for the sale of forfeited lands, in which the owners or claimants could intervene and effect a redemption of their lands from forfeiture, a judicial proceeding. This view was reaffirmed in *Wiant* v. *Hays, Commissioner*, 38 W. Va. 681, 684, in which Judge Brannon,

delivering the unanimous judgment of the state court, observed that what was said in *McClure* v. *Maitland* as to the landowner not being entitled of right to be made a party to the proceeding instituted for the sale of forfeited lands for the benefit of the school funds, had reference to the then existing act which was changed by the act of 1882. Answering the suggestion that the proceedings under the new law were not judicial, the court said: "Now, why, with parties plaintiff and defendant, process, pleading, hearing between the parties, decree, etc., it is not, if not technically a chancery suit, yet a suit, I cannot see; a suit under a special statute, it is true, but none the less a suit. So, substantially, it was regarded in *Hays* v. *Camden's Heirs*, 38 W. Va. 109, 18 S. E. Rep. 461. Proceedings at rules take place as in ordinary and common law suits. In some places it is called a 'suit.' But I know that it is said by those holding the other view that the question is not to be tested by the circumstances, such as I have alluded to, the presence of pleading, process, hearing, etc., but it must be tested by the nature of the proceeding; that is, that it is only an administrative process by the State, through an officer and court, to realize money on its own property. But to this I reply that though the State might make the proceeding such, and did in its acts up to 1882, yet by its act in 1882 it changed the proceeding from one *ex parte* to one *inter partes*, and clothed the proceeding with all the habiliments of a suit; and still it did not proceed against the land, taking the act of forfeiture as a concession, and simply at once sell the land, but it subjected its right and title under the supposed forfeiture to question and investigation under the law through a suit, called in all interested adversely to its claim, and gave them leave to contest its right, and made its claim the subject of litigation."

It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands.

It is said that the landowner will be without remedy if the commissioner of the school fund should fail to institute the proceeding in which the statute permitted such owner to intervene by petition and obtain a redemption of his lands from the forfeiture claimed by the State. It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law, nor that the courts are without power to compel him to act, where his action becomes necessary for the protection of the rights of the landowner.

It is further said that a forfeiture may arise under the constitution of West Virginia despite any effort of the landowner to prevent it; that although the owner may direct his lands to be entered on the proper land books, and that he be charged with the taxes due thereon, the custodian of such books may neglect to perform his duty. Thus, it is argued, the lands may be forfeited by reason of the landowner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect. We do not so interpret the state constitution or the statutes enacted under it. If the landowner does all that is reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been "charged on such books" with the state tax. The State could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books. Any steps attempted to be taken by the officers of the State, based upon such neglect of its agent — the taxpayer not being in default — would be without legal sanction, and could be restrained by any court having jurisdiction in the premises. We go further and say, that any sale had under the statute providing for a sale, under the order of court, for the benefit of the school fund, of lands alleged to be forfeited by reason of their not having been charged on the land books for five consecutive years with the state tax due thereon, would be absolutely void, if the landowner was not before the court, or had not been duly notified of the proceedings, but had done all that he could reasonably do to have his lands en-

tered on the proper books and to cause himself to be charged with the taxes due thereon. If the State was not entitled to treat them *as forfeited lands*, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected. In the present case, it does not appear that any evidence was offered tending to show that the absence from the land books of any charge of taxes on the lands claimed by the plaintiff during five consecutive years after their redemption by Randall, trustee, in 1883 was due to any neglect of the officers of the State, or that the plaintiff, or those under whom he asserts title, entered or attempted to enter the lands upon the land books, or that he or they caused or attempted to cause the lands to be charged with taxes thereon. But there was evidence tending to show that the requirements of the constitution were not met during any of the years from 1883 to the bringing of this action. So far as the record discloses, it is a case of sheer neglect upon the part of the landowner to perform the duty required of him by the constitution and statutes of the State.

Another point made by the plaintiff in error is, that the provision of the constitution of Virginia exempting tracts of less than one thousand acres from forfeiture is a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be pre-

scribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding a denial of the equal protection of the laws.

For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State.

Having discussed all the points suggested by the assignments of error which we deem it necessary to examine, we conclude this opinion by saying that as neither the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887 and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the State was not displaced or discharged, and the Circuit Court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain this action of ejectment. We concur in what the Supreme Court of Appeals of Virginia said

in a case recently decided: "In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person, it is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the Commonwealth for the non-payment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or re-granted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth." *Reusens* v. *Lawson*, 91 Virginia, 226.

The judgment of the Circuit Court of the United States is

*Affirmed.*